B.L. 7550

ONTARIO
LABOUR RELATIONS BOARD
REPORTS

May/June 2009

Ontario

ONTARIO LABOUR RELATIONS BOARD

Chair	K. WHITAKER
Alternate Chair	D.L. GEE
Vice-Chairs	C.J. ALBERTYN
	I. ANDERSON
	P. CHAUVIN
	M.E. CUMMINGS
	H. FREEDMAN
	N. JESIN
	L. KANEE
	P. KELLY
	J. LEWIS
	M. LEWIS
	D.A. McKEE
	M.A. McKELLAR
	B. McLEAN
	C. MURRAY
	C. ROWAN
	T. SARGEANT
	C. SCHMIDT
	S. SERENA
	L. SHOULDICE
	M. SILVERMAN
	J. SLAUGHTER
	T. WACYK
	K. WADDINGHAM
Members	R. BAXTER
	A. HAWARD
	P. LeMAY
	S. McMANUS
	R. O'CONNOR
	D. PATTERSON
	C. PHILLIPS
	B. ROBERTS
	J. RUNDLE
	J. TOMLINSON
Director/Registrar	T.R. PARKER
Board Solicitors	V. STELMASZYNSKI
	L. MARVY

ONTARIO
LABOUR RELATIONS BOARD
REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Cited [2009] OLRB REP. MAY/JUNE

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

CASES REPORTED

		PAGE
1.	1496161 Ontario Inc. o/a Todd Grier Excavating; Re Director of Employment Standards	321
2.	2095527 Ontario Limited c.o.b. as Embassy Suites; Re LIUNA, Ontario Provincial District Council	327
3.	Aecon Construction Group Inc.; Re Cement Masons Local 598; Jim Boniface, Inspector	334
4.	Bruce Power LP; Re Sheet Metal Workers' International Association, Local 473.	339
5.	Centennial Electric Ltd. et al; Re Robert Gullins et al; Discovery Electric et al; Re IBEW	352
6.	Flynn Canada Ltd.; Re Ironworkers, Local 721	358
7.	Greenfield Ethanol Inc.; CEP, Local 203	377
8.	Harris, Dave; Re SEIU Local 1.On; Re YMCA Hamilton	383
9.	Manorcore Construction Inc. and Manacore Holdings Inc.; Re LIUNA, Ontario Provincial District Council	400
10.	Millard Refrigerated Services, Inc. Re Teamsters Local Union No. 419	406
11.	National Waste Services Inc.: Re CAW-Canada; Re Erie Personnel Corporation .	415
12.	Niacon Limited; Re IUOE Local 793; Re LIUNA, Ontario Provincial District Council	436
13.	PCL Constructors Canada Inc.; Re LIUNA, Local 247; Ontario Provincial District Council; Sheet Metal Workers International Association, Local Union 269; Ontario Sheet Metal Workers' & Roofers' Conference, and Kevin Kealey, Inspector	442
14.	Stock Transportation Ltd; Re Teamsters	447
15.	Ten Star Financial Services; Re Susan Vogan	458
16.	White Contracting Ltd.; Re Eric Paradis; LIUNA, Ontario Provincial District Council	467
17.	William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc.; Re CUPE, Local 145	470

COURT PROCEEDINGS

1. Abdurahman Abdoulrab et al; Re Novaquest Finishing Inc; Catelectric Inc.; 4064186 Ontario Inc. 480

2. Pre-Eng Contracting Ltd. and Constaff Construction Ltd.; LIUNA, Local 506; Carpenters Council; CLAC 52 494

3. Graham Bros. Construction Ltd.; Re LIUNA, Ontario Provincial District Council and IUOE, Local 793 and OLRB 497

4. Greater Essex County District School Board; Plumbers Local 52 500

5. Lorraine Fraser Viscount and Kuipers Residential Homes; Re The Director of Employment Standards, Shirley Coyea and Dana Grant and OLRB 501

6. Mackenzie Group Construction Inc.; Re Painters Local 1891 504

7. Rochon Building Corporation Re Carpenters Council 505

8. Schuit Plastering & Stucco Inc.; Re Universal Workers Union, LIUNA Local 183 506

SUBJECT INDEX

Bar – Bargaining Unit – Certification – Employee – This application for certification encompassed at least one individual who was an employee in the bargaining unit proposed in a previous application that was dismissed by the Board – The issue before the Board was whether the s. 10(3.1) exemption to the bar imposed by s. 10(3) applied – The Board found that the first condition of s. 10(3.1) was not met since the employee's position at the time of original application (driver for the employer in the City of Toronto) was not different from her position at the time of the new application (driver for the employer in North Scarborough) – Concerning the employer's request to exercise its discretion to impose a further bar pursuant to s. 111(2)(k), the Board found it had none, since by virtue of the second application being barred, the Board was not able to "consider" it – Finally, the Board decided that even if it had the discretion to impose an additional bar, it would not since the original application was filed in January 2006 and an additional bar would subject the employees to a bar until June 2010, a far longer period of repose than contemplated by the Act – Application terminated

STOCK TRANSPORTATION LTD; RE TEAMSTERS 447

Bar – Bargaining Unit – Certification – Representation Vote – CEP initially applied to certify the utilities department of the employer's employees – The employer disputed the appropriateness of the unit but failed to provide a different unit description and did not file a s. 8.1 objection – Although the CEP won the representation vote, the Board expressed concern about the propriety of the unit applied for, and sought submissions – Following receipt of the employer's submissions, the CEP filed a second application for certification, for a potential craft bargaining unit (operating engineers) – The Board determined that the original unit applied for was not appropriate and ordered a vote in an all-employee bargaining unit in the first application – The CEP then sought to withdraw the first application; the second vote did not take place – The Board addressed two issues: whether any conditions should attach to the withdrawal of the first application, and whether it should refuse to consider the second application – The Board held that when it ordered the second representation vote in the original file, it was signaling that the first vote was not meaningful and could not be considered "the" representation vote contemplated by s. 7(10) of the Act, which would lead to a mandatory bar – Because the bargaining unit voted on in the first vote was not appropriate, there was no expression of employee wishes in an appropriate unit – The union's withdrawal of the application before the second vote could only lead to the discretionary bar found in s. 7(9), and the Board chose not to impose a discretionary bar – Second application for certification referred to Registrar for hearing

GREENFIELD ETHANOL INC.; CEP, LOCAL 203 377

Bargaining Unit – Bar – Certification – Employee – This application for certification encompassed at least one individual who was an employee in the bargaining unit proposed in a previous application that was dismissed by the Board – The issue before the Board was whether the s. 10(3.1) exemption to the bar imposed by s. 10(3) applied – The Board found that the first condition of s. 10(3.1) was not met since the employee's position at the time of original application (driver for the employer in the City of Toronto) was not different from her position at the time of the new application (driver for the employer in North Scarborough) – Concerning the employer's request to exercise its discretion to impose a further bar pursuant to s. 111(2)(k), the Board found it had none, since by virtue of the second application being barred, the Board was not able to

"consider" it – Finally, the Board decided that even if it had the discretion to impose an additional bar, it would not since the original application was filed in January 2006 and an additional bar would subject the employees to a bar until June 2010, a far longer period of repose than contemplated by the Act – Application terminated

STOCK TRANSPORTATION LTD; RE TEAMSTERS 447

Bargaining Unit – Bar – Certification – Representation Vote – CEP initially applied to certify the utilities department of the employer's employees – The employer disputed the appropriateness of the unit but failed to provide a different unit description and did not file a s. 8.1 objection – Although the CEP won the representation vote, the Board expressed concern about the propriety of the unit applied for, and sought submissions – Following receipt of the employer's submissions, the CEP filed a second application for certification, for a potential craft bargaining unit (operating engineers) – The Board determined that the original unit applied for was not appropriate and ordered a vote in an all-employee bargaining unit in the first application – The CEP then sought to withdraw the first application; the second vote did not take place – The Board addressed two issues: whether any conditions should attach to the withdrawal of the first application, and whether it should refuse to consider the second application – The Board held that when it ordered the second representation vote in the original file, it was signaling that the first vote was not meaningful and could not be considered "the" representation vote contemplated by s. 7(10) of the Act, which would lead to a mandatory bar – Because the bargaining unit voted on in the first vote was not appropriate, there was no expression of employee wishes in an appropriate unit – The union's withdrawal of the application before the second vote could only lead to the discretionary bar found in s. 7(9), and the Board chose not to impose a discretionary bar – Second application for certification referred to Registrar for hearing

GREENFIELD ETHANOL INC.; CEP, LOCAL 203 377

Bargaining Unit – Certification – Judicial Review – Application by the LIUNA, OPDC (supported by the IUOE) for judicial review of an interim decision by the Board relating to certifications sought for workers of Graham Bros. Construction Ltd. – In its response to both applications for certification, Graham identified 24 individuals on each of its employee lists – The unions determined that 11 of those individuals were properly on the LIUNA list and 13 were properly on the IUOE list – The IUOE then withdrew its application for certification – The unions argued that because Graham was not permitted by s. 128.1(3) of the Act to file a qualified list, they were entitled to take Graham's list as an unqualified position and reach agreement between themselves on the distribution of the 24 employees – Accordingly, when the applicants agreed 13 names belonged on the IUOE list, Graham was a party to that agreement – The Board found that Graham was not a party to the agreement and that in any event the agreement became irrelevant when the application was withdrawn – The Board directed Graham to provide an unqualified list and allowed LIUNA to respond – LIUNA sought judicial review of the Board's decision – The Court held that the Board did not rule on Graham's ability to provide an unqualified list; the finding that Graham was not a party to the agreement between the unions was reasonable – Application dismissed

GRAHAM BROS. CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND IUOE, LOCAL 793 AND OLRB 497

Bargaining Unit – *Prima Facie* Motion – Related Employer – CUPE sought a declaration that the three responding parties constitute a single employer under section 1(4) of the Act –

A collaboration involving William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc. resulted in WOHC contracting out certain work to CSI – Certain WOHC employees were as a result terminated and re-hired by CSI – The identical collective agreement applied to both the remaining WOHC employees and the transferred employees but the bargaining structure was altered to form two bargaining units – The issue was whether the Board should exercise its discretion to make a related employer declaration in order to preserve a particular bargaining structure – The responding parties moved that the application be dismissed on the grounds that the applicant had not pleaded a *prima facie* case – The Board found that the parties had clearly turned their minds to the management of contracting out in the very circumstances of this case – There was no evidence of mischief, no suggestion the bargaining unit would be subject to further fragmentation and no facts pleaded that would indicate an inability on the union's part to fully engage in the collective bargaining process – The Board will not exercise its discretion to make a related employer declaration merely to preserve a bargaining structure – Application dismissed

WILLIAM OSLER HEALTH CENTRE, THE HEALTHCARE INFRASTRUCTURE COMPANY OF CANADA INC. AND CARILLION SERVICES INC.; RE CUPE, LOCAL 145 470

Certification – Bar – Bargaining Unit – Employee – This application for certification encompassed at least one individual who was an employee in the bargaining unit proposed in a previous application that was dismissed by the Board – The issue before the Board was whether the s. 10(3.1) exemption to the bar imposed by s. 10(3) applied – The Board found that the first condition of s. 10(3.1) was not met since the employee's position at the time of original application (driver for the employer in the City of Toronto) was not different from her position at the time of the new application (driver for the employer in North Scarborough) – Concerning the employer's request to exercise its discretion to impose a further bar pursuant to s. 111(2)(k), the Board found it had none, since by virtue of the second application being barred, the Board was not able to "consider" it – Finally, the Board decided that even if it had the discretion to impose an additional bar, it would not since the original application was filed in January 2006 and an additional bar would subject the employees to a bar until June 2010, a far longer period of repose than contemplated by the Act – Application terminated

STOCK TRANSPORTATION LTD; RE TEAMSTERS 447

Certification – Bargaining Unit – Judicial Review – Application by the LIUNA, OPDC (supported by the IUOE) for judicial review of an interim decision by the Board relating to certifications sought for workers of Graham Bros. Construction Ltd. – In its response to both applications for certification, Graham identified 24 individuals on each of its employee lists – The unions determined that 11 of those individuals were properly on the LIUNA list and 13 were properly on the IUOE list – The IUOE then withdrew its application for certification – The unions argued that because Graham was not permitted by s. 128.1(3) of the Act to file a qualified list, they were entitled to take Graham's list as an unqualified position and reach agreement between themselves on the distribution of the 24 employees – Accordingly, when the applicants agreed 13 names belonged on the IUOE list, Graham was a party to that agreement – The Board found that Graham was not a party to the agreement and that in any event the agreement became irrelevant when the application was withdrawn – The Board directed Graham to provide an unqualified list and allowed LIUNA to respond – LIUNA sought judicial review of the Board's decision – The Court held that the Board did not rule on Graham's ability to provide an

unqualified list; the finding that Graham was not a party to the agreement between the unions was reasonable – Application dismissed

GRAHAM BROS. CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND IUOE, LOCAL 793 AND OLRB 497

Certification – Charter of Rights and Freedoms – Construction Industry – Employer Support – Judicial Review – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed – On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52 494

Certification – Construction Industry – Intervention – Reconsideration – Standing - Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721 358

Certification – Construction Industry – Judicial Review – Natural Justice – Reconsideration – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court

found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

MACKENZIE GROUP CONSTRUCTION INC.; RE PAINTERS LOCAL 1891 504

Certification – Construction Industry – Judicial Review – The Board had found that three site superintendents were members of a bargaining unit, as they were not performing "managerial functions" pursuant to s. 1(3)(b) of the Act – The court found the Board considered the evidence before it; its past jurisprudence on the issue; and it clearly understood the reason for the exclusion was to prevent conflict of interest – Further the Board weighed the evidence and concluded the individuals were working foremen without significant influence over other individuals – The Board's reasons were clear and the conclusions fell within a range of reasonable outcomes, given the evidence – Application dismissed

ROCHON BUILDING CORPORATION RE CARPENTERS COUNCIL..... 505

Certification – Construction Industry – Practice and Procedure – Related employer – The employer filed its response to the union's challenges, but failed to deliver it to the union, in accordance with the Board's standard direction – The union asserted the employer had accepted the union's position and sought certification – The Board noted that the direction was not required by the Act or its Rules; that there was no consequence set out for a failure to deliver; and that the purpose of the direction was to facilitate discussion between the parties and to prevent gerrymandering the list – Finally, the Board found there was no prejudice to the union – The Board found there was no proper basis to refuse to permit the employer from maintaining their objection to the union's challenges – Matter continues

MANORCORE CONSTRUCTION INC. AND MANACORE HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 400

Certification – Construction Industry – Practice and Procedure – The OPDC filed with the Board its challenges to 12 of the 18 individuals the employer had listed as being employees in the bargaining unit, but failed to deliver the letter to the employer – The employer, referring to the Board's direction in its decision (and Information Bulletin #9), asserted that as the OPDC had not delivered its challenges, the list of employees was settled – The Board noted that neither its direction nor the Information Bulletin sets out any consequences for a failure to comply; that the purpose of the requirement was to prevent gerrymandering; that the employer did not suggest it was prejudiced by not receiving the OPDC's challenges (as the employer was notified about the challenges prior to the Regional Certification Meeting and replied to them) – Accordingly there was no legitimate basis for finding the OPDC's failure to notify the employer in a timely fashion precluded the OPDC from pursuing its challenges – Matter continues

NIACON LIMITED; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 436

Certification – Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union, having lost a representation vote, receiving far fewer votes than the membership support it appeared to have on application, sought remedial certification under s. 11, ULP remedies, interim reinstatement of an organizer and an interim declaration that the employer revert to its past practice of awarding overtime – The Board found that there appeared to be a reasonable basis to conclude that the employer was aware of the

organizer's involvement as a union supporter and that its decision to terminate was partly motivated by that – The Board's conclusion was supported by the aggressive position taken by the employer with respect to the union's organizing drive; the timing of the discharge being mere hours after the application for certification was filed; an unaddressed statement that the discharge was the result of a directive from head office; and uncertainty with respect to the interpretation and application of the Attendance policy – The Board also found that the denial of overtime hours to W appeared to be a departure from the employer's past practice which was not unrelated to the exercise of rights under the Act – The Board found the other factors under s. 98, to have been met and made a number of declarations, including reinstatement, and that employees have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support – Declarations made

MILLARD REFRIGERATED SERVICES, INC. RE TEAMSTERS LOCAL UNION NO. 419 406

Certification – Employer – Judicial Review – Schuit applied for judicial review of two decisions by the Board certifying LIUNA after the employer had failed to respond to the application – In the reconsideration before the Board, Schuit claimed that it did not respond to the application because it was not the employer of the three employees; it had assumed the application was sent to it in error; and it did not appreciate the nature and effect of the application – The Board denied the applicant's request for reconsideration and upheld the original certification – On judicial review, the Court held that the Board was entitled to considerable deference particularly with respect to the exercise of its discretion in the certification process – After considering the employer's reasons for failing to respond to the application, it was reasonable for the Board to exercise its discretion to refuse to reconsider its decision – Application dismissed

SCHUIT PLASTERING & STUCCO INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 506

Certification – Employer – The sole outstanding issue concerned whether National or Erie Personnel was the employer of the drivers and pitchers working out of a waste and recycling yard in Stoney Creek – The facts were not in material dispute and the Board began its analysis by noting that the Supreme Court in *Pointe-Claire* made it clear that in assessing the true employer in these triangular relationships what is essential is determining which party exercises the greatest control over all aspects of the employee's work – The Board applied the factors from *York Condominium Corporation* and found only one factor pointed toward Erie (the intention to create an employment relationship) – The Board found that National had the fundamental control over the working conditions of the drivers and pitchers – Finally the Board noted that its finding was not altered by the recent (not yet in force) changes to the *ESA, 2000* under Bill 139 which will make temporary help agencies the employer for the purposes of the *ESA, 2000* – Certificate issued

NATIONAL WASTE SERVICES INC.: RE CAW-CANADA; RE ERIE PERSONNEL CORPORATION 415

Charter of Rights and Freedoms – Certification – Construction Industry – Employer Support – Judicial Review – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC

representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed – On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52 494

Construction Industry – Certification – Charter of Rights and Freedoms – Employer Support – Judicial Review – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed – On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52 494

Construction Industry – Certification – Intervention – Reconsideration – Standing - Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour

practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721 358

Construction Industry – Certification – Judicial Review – Natural Justice – Reconsideration – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

MACKENZIE GROUP CONSTRUCTION INC.; RE PAINTERS LOCAL 1891 504

Construction Industry – Certification – Judicial Review – The Board had found that three site superintendents were members of a bargaining unit, as they were not performing "managerial functions" pursuant to s. 1(3)(b) of the Act – The court found the Board considered the evidence before it; its past jurisprudence on the issue; and it clearly understood the reason for the exclusion was to prevent conflict of interest – Further the Board weighed the evidence and concluded the individuals were working foremen without significant influence over other individuals – The Board's reasons were clear and the conclusions fell within a range of reasonable outcomes, given the evidence – Application dismissed

ROCHON BUILDING CORPORATION RE CARPENTERS COUNCIL 505

Construction Industry – Certification – Practice and Procedure – Related employer – The employer filed its response to the union's challenges, but failed to deliver it to the union, in accordance with the Board's standard direction – The union asserted the employer had accepted the union's position and sought certification – The Board noted that the direction was not required by the Act or its Rules; that there was no consequence set out for a failure to deliver; and that the purpose of the direction was to facilitate discussion between the parties and to prevent gerrymandering the list – Finally, the Board found there was no prejudice to the union – The Board found there was no proper basis to refuse to permit the employer from maintaining their objection to the union's challenges – Matter continues

MANORCORE CONSTRUCTION INC. AND MANACORE HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 400

Construction Industry – Certification – Practice and Procedure – The OPDC filed with the Board its challenges to 12 of the 18 individuals the employer had listed as being employees in the bargaining unit, but failed to deliver the letter to the employer – The employer, referring to the Board's direction in its decision (and Information Bulletin #9), asserted that as the OPDC had not delivered its challenges, the list of employees was settled – The Board noted that neither its direction nor the Information Bulletin sets out any consequences for a failure to comply; that the purpose of the requirement was to prevent gerrymandering; that the employer did not suggest it was prejudiced by not receiving the OPDC's challenges (as the employer was notified about the challenges prior to the Regional Certification Meeting and replied to them) – Accordingly there was

no legitimate basis for finding the OPDC's failure to notify the employer in a timely fashion precluded the OPDC from pursuing its challenges – Matter continues

NIACON LIMITED; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 436

Construction Industry – Delay – Standing – Unfair Labour Practice – Four members of the IBEW local brought an application against nineteen electrical contractors alleging they interfered in an election of officers to the Local by assisting the incumbent slate in their election efforts – The responding parties brought a motion to dismiss on a number of grounds – The Board found the members had no standing to bring a complaint under s. 72 or 76 as these sections prohibit conduct towards individual employees and the members were not employees nor were they authorized to represent any employees – The Board found however that they did have standing to bring an application alleging a breach of s. 70 since the allegation was arguably an interference in the administration of a trade union, however the Board went on to exercise its discretion not to inquire into the matter for four reasons: first, there was no basis for making a cease and desist order as requested; second, the "rule making and sanctioning role" was not in keeping with the general thrust of the Act; third, the delay was significant in that the complaint was brought well after the time the Board, or the employer, could do anything; finally, while the conduct complained of may breach s. 70, this is also not so plain and obvious – Complaint dismissed

CENTENNIAL ELECTRIC LTD. ET AL; RE ROBERT GULLINS ET AL; DISCOVERY ELECTRIC ET AL; RE IBEW 352

Construction Industry – Practice and Procedure – Termination – The union was certified on November 14, 2008 – Although the Board received the application for termination on May 15th, pursuant to the Rules, the application was filed on May 14, 2009, the day the applicant sent it by Priority Courier – Pursuant to s. 132(1) an application is untimely if made within 6 months of certification – The Board found it was clear (according to common law and the *Legislation Act*) that the 6 month period began on November 15th and expired May 14th at midnight – Therefore the application was untimely, having been made on the last day of the six month period – Application dismissed

WHITE CONTRACTING LTD.; RE ERIC PARADIS; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 467

Construction Industry Certification – Non-Construction Employer – Status – The employer asserted the Board lacked the authority to issue certificates because the employer was a "non-construction employer" – The union argued the Board was not required to determine the non-construction employer issue as part of the certification application and that the employer had to bring a separate application to have that issue addressed – The Board followed *Amica Mature Lifestyles Inc.* finding that the employer's status as a non-construction employer is properly raised in the context of a certification application under s. 128.1 – The Board found nothing in the Act to suggest that the issue of the employer's status as a non-construction employer ought not to be dealt with in the context of a certification application – Indeed the structure of the Act made it clear that the Board could only issue certificates to the union with respect to an employer that is not a non-construction employer – Therefore the Board determined that the question of status will be decided in the context of the certification application – Matter continues

2095527 ONTARIO LIMITED C.O.B. AS EMBASSY SUITES; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 327

Construction Industry Grievance – Judicial Review – Non-construction Employer – Timeliness – In a preliminary decision the Board ruled that the grievance was timely; although the grievance was referred late to arbitration under the collective agreement the Board did have the discretion to extend the time for the referral; and it was appropriate to accept the referral to arbitration – Greater Essex sought judicial review of the Board's interim decision and the union brought a motion to quash the application as premature – The court found no exceptional circumstances that would persuade it to hear the application – The court stated that the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point – Motion granted – Application for judicial review quashed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; PLUMBERS LOCAL 52 500

Construction Industry Grievance – Seven grievors were suspended for a variety of days for distributing inappropriate emails over the employer's system – The union and grievors acknowledged that the distribution of the emails in question was inappropriate and constituted cause for discipline; the only issue was quantum of discipline imposed – In deciding not to substitute any lesser penalties for the suspensions imposed, the Board noted that: an employer has an interest and obligation to prevent a poisoned work environment and maintain one that is free from harassment; the emails were to varying degrees very offensive; the fact the emails were sent to individuals who may not have been offended was not relevant; no "warning shot" was necessary since the grievors were all fully aware of the employer's policy; and the way the employer determined the penalty was not arbitrary – The length of the suspensions were all within the range of reasonableness and the Board was not persuaded to change the discipline imposed – Grievance dismissed

BRUCE POWER LP; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 473 339

Delay – Construction Industry – Standing – Unfair Labour Practice – Four members of the IBEW local brought an application against nineteen electrical contractors alleging they interfered in an election of officers to the Local by assisting the incumbent slate in their election efforts – The responding parties brought a motion to dismiss on a number of grounds – The Board found the members had no standing to bring a complaint under s. 72 or 76 as these sections prohibit conduct towards individual employees and the members were not employees nor were they authorized to represent any employees – The Board found however that they did have standing to bring an application alleging a breach of s. 70 since the allegation was arguably an interference in the administration of a trade union, however the Board went on to exercise its discretion not to inquire into the matter for four reasons: first, there was no basis for making a cease and desist order as requested; second, the "rule making and sanctioning role" was not in keeping with the general thrust of the Act; third, the delay was significant in that the complaint was brought well after the time the Board, or the employer, could do anything; finally, while the conduct complained of may breach s. 70, this is also not so plain and obvious – Complaint dismissed

CENTENNIAL ELECTRIC LTD. ET AL; RE ROBERT GULLINS ET AL; DISCOVERY ELECTRIC ET AL; RE IBEW 352

Discharge for Union Activity – Certification – Interim Relief – Unfair Labour Practice – The union, having lost a representation vote, receiving far fewer votes than the membership support it appeared to have on application, sought remedial certification under s. 11, ULP remedies, interim reinstatement of an organizer and an interim declaration that the employer revert to its past practice of awarding overtime – The Board found that there appeared to be a reasonable basis to conclude that the employer was aware of the organizer's involvement as a union supporter and that its decision to terminate was partly motivated by that – The Board's conclusion was supported by the aggressive position taken by the employer with respect to the union's organizing drive; the timing of the discharge being mere hours after the application for certification was filed; an unaddressed statement that the discharge was the result of a directive from head office; and uncertainty with respect to the interpretation and application of the Attendance policy – The Board also found that the denial of overtime hours to W appeared to be a departure from the employer's past practice which was not unrelated to the exercise of rights under the Act – The Board found the other factors under s. 98, to have been met and made a number of declarations, including reinstatement, and that employees have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support – Declarations made

MILLARD REFRIGERATED SERVICES, INC. RE TEAMSTERS LOCAL UNION NO. 419 406

Duty of Fair Representation – Re edy – Unfair Labour Practice – The employer awarded a part-time Residential Counsellor position to the applicant H, who had less seniority than V – The collective agreement contained a job-posting clause requiring the employer to award the position to the more senior candidate where there was relative equality on a number of factors – The Union filed a grievance on V's behalf and entered into a settlement with the employer in which V was awarded the position filled by H – H made three allegations: first, the Union failed to properly communicate with him about the status of V's grievance; second, that it was clearly evident that he had better qualifications and experience and that seniority should not have been a factor; and finally, the union did not communicate properly with him after he learned of the settlement – On the second point, the Board found that there was no "rational pathway" that was evident between the facts, competing interests and the decision made by the union – The union did not undertake a proper investigation to determine whether V's grievance was worthy of pursuit, and therefore whether she should have been awarded the position because of her seniority – The Board found the union's approach was clearly not rational and called out for an explanation—which was not provided – Accordingly, on this point the Board found a violation of s. 74 – The Board was also concerned about the union's failure to advise H of his right to participate at the arbitration of V's grievance, but on the facts was not prepared to make a finding of bad faith, or that it was so reckless as to constitute a violation – Declaration of a breach – Matter referred to Manager of Field Services

HARRIS, DAVE; RE SEIU LOCAL 1.ON; RE YWCA HAMILTON 383

Employee – Bar – Bargaining Unit – Certification – This application for certification encompassed at least one individual who was an employee in the bargaining unit proposed in a previous application that was dismissed by the Board – The issue before the Board was whether the s. 10(3.1) exemption to the bar imposed by s. 10(3) applied – The Board found that the first condition of s. 10(3.1) was not met since the employee's position at the time of original application (driver for the employer in the City of Toronto) was not different from her position at the time of the new application (driver for

the employer in North Scarborough) – Concerning the employer's request to exercise its discretion to impose a further bar pursuant to s. 111(2)(k), the Board found it had none, since by virtue of the second application being barred, the Board was not able to "consider" it – Finally, the Board decided that even if it had the discretion to impose an additional bar, it would not since the original application was filed in January 2006 and an additional bar would subject the employees to a bar until June 2010, a far longer period of repose than contemplated by the Act – Application terminated

STOCK TRANSPORTATION LTD; RE TEAMSTERS 447

Employer – Certification – Judicial Review – Schuit applied for judicial review of two decisions by the Board certifying LIUNA after the employer had failed to respond to the application – In the reconsideration before the Board, Schuit claimed that it did not respond to the application because it was not the employer of the three employees; it had assumed the application was sent to it in error; and it did not appreciate the nature and effect of the application – The Board denied the applicant's request for reconsideration and upheld the original certification – On judicial review, the Court held that the Board was entitled to considerable deference particularly with respect to the exercise of its discretion in the certification process – After considering the employer's reasons for failing to respond to the application, it was reasonable for the Board to exercise its discretion to refuse to reconsider its decision – Application dismissed

SCHUIT PLASTERING & STUCCO INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 506

Employer – Certification – The sole outstanding issue concerned whether National or Erie Personnel was the employer of the drivers and pitchers working out of a waste and recycling yard in Stoney Creek – The facts were not in material dispute and the Board began its analysis by noting that the Supreme Court in *Pointe-Claire* made it clear that in assessing the true employer in these triangular relationships what is essential is determining which party exercises the greatest control over all aspects of the employee's work – The Board applied the factors from *York Condominium Corporation* and found only one factor pointed toward Erie (the intention to create an employment relationship) – The Board found that National had the fundamental control over the working conditions of the drivers and pitchers – Finally the Board noted that its finding was not altered by the recent (not yet in force) changes to the *ESA, 2000* under Bill 139 which will make temporary help agencies the employer for the purposes of the *ESA, 2000* – Certificate issued

NATIONAL WASTE SERVICES INC.: RE CAW-CANADA; RE ERIE PERSONNEL CORPORATION..... 415

Employer Support – Certification – Charter of Rights and Freedoms – Construction Industry – Judicial Review – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed

-- On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52 494

Employment Standards – Judicial Review – Related Employer – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application (see [2006] OLRB Rep. March/April 248) – The application for judicial review was dismissed by the Divisional Court (see [2007] OLRB Rep. July/Aug 842) – First, the Court of Appeal noted the legislative mandate that the courts "not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable," and made it clear that it did not accept the applicants' argument that "the Divisional Court erred in failing to articulate first what in its view would be the correct interpretation of s. 4 before conducting its reasonableness analysis" – Second, the Court was not persuaded that the OLRB's decision under the current ESA "can be characterized as fitting into two competing incompatible lines of authority" and accordingly found it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions – Finally, the court reiterated that a reasonable decision must be "justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" – The court found the Board's decision met that standard – Appeal dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC; CATELECTRIC INC.; 4064186 ONTARIO INC. 480

Employment Standards – Judicial Review – The Board had upheld an ESO's finding that employees of the applicants' group homes were not covered by an exemption for "residential care workers" and therefore were entitled to overtime pay – On judicial review, the Court found that while the Board recognized the purposes of the ESA, it failed to address the purpose of the exemption, namely to facilitate the operation of the group homes, and failed to balance the purpose of the exemption against the purposes of the Act – The Court found it was unnecessary to address the Board's "consideration of whether the residents in questions were 'developmentally handicapped persons' within the meaning of the regulation," as the Court found the Board's decision was not reasonable due to its failure to address the purpose of the exemption – Application allowed; the Court did not remit the matter back to the Board, but substituted its own decision

LORRAINE FRASER VISCOUNT AND KUIPERS RESIDENTIAL HOMES; RE THE DIRECTOR OF EMPLOYMENT STANDARDS, SHIRLEY COYEA AND DANA GRANT AND OLRB 501

Employment Standards – The employer sought review of the employment standards officer's order finding that the installation of septic tanks/systems was not captured by the Regulation exempting overtime pay until 50 hours per week – The Board found that the installation of the septic systems was not captured by the word sewers in the Regulation for two reasons: first, on a plain reading sewers are conduits or channels for the movement of waste, and are not entire sewage systems – The evidence showed that the key component of the employer's work was the installation of the septic tank, which is not a sewer – Second, on a purposive review of the Act and the regulation, and assuming there was some ambiguity, the Board found that it must construe the regulation narrowly and give it an interpretation that encourages employers to comply with the minimum standards – Application for review dismissed

1496161 ONTARIO INC. O/A TODD GRIER EXCAVATING; RE DIRECTOR OF EMPLOYMENT STANDARDS..... 321

Health and Safety – PCL and the Labourers both sought suspension of an Inspector's orders requiring that only qualified sheet metal workers conduct the dismantling of certain heating and air conditioning materials as part of a hospital demolition – The Sheet Metal Workers Union had complained to the Ministry of Labour that the work was being carried out by persons without appropriate qualifications and therefore in violation of the OHSA and the *Trades Qualification and Apprenticeship Act* – The Board noted that there is a jurisdictional dispute involving the same parties arising from the same fact situation currently before it – The Board found that PCL and LIUNA have pleaded a strong *prima facie* case for success on the merits of the appeal; the usual reasons for deference to the inspector are absent in this case; there is no threat to the health and safety of workers; operational or institutional prejudice may be present for some of the parties, but the prejudice is not significant – Suspension granted

PCL CONSTRUCTORS CANADA INC.; RE LIUNA, LOCAL 247; ONTARIO PROVINCIAL DISTRICT COUNCIL; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 269; ONTARIO SHEET METAL WORKERS' & ROOFERS' CONFERENCE, AND KEVIN KEALEY, INSPECTOR 442

Health and Safety – *Prima Facie* – The applicant alleged she was terminated by the company's President as a reprisal for raising health and safety concerns – On review of the Board's case law and the pleadings, the Board concluded that the pith and substance of the complaint was that she was unjustly terminated from employment for complaining about the President's verbal abuse (that is, alleged bullying, personal harassment and emotional and psychological abuse), which she found deeply insulting, demeaning and humiliating – Given, however, that there was no indication of the existence of a health and safety nexus the Board exercised its discretion not to inquire into the matter – Application dismissed

TEN STAR FINANCIAL SERVICES; RE SUSAN VOGAN..... 458

Health and Safety – Privilege – Suspension – Aecon sought a suspension of part of an Inspector's order requiring Aecon to produce its Incident Investigation Report, which it claimed was covered by solicitor/client and/or litigation privilege – The Board found that

a suspension of the Order would not endanger worker safety (there were no preventative measures ordered for the protection of workers and all the other orders had been complied with); the prejudice to Aecon (releasing a document that may be determined to be privileged) outweighed the prejudice to the Inspector; and Aecon has a strong *prima facie* case (the facts set out, if proven, suggest that the document is privileged) – Part of Order Suspended – Appeal to be heard

AECON CONSTRUCTION GROUP INC.; RE CEMENT MASONS LOCAL 598; JIM BONIFACE, INSPECTOR 334

Interim Relief – Certification – Discharge for Union Activity – Unfair Labour Practice – The union, having lost a representation vote, receiving far fewer votes than the membership support it appeared to have on application, sought remedial certification under s. 11, ULP remedies, interim reinstatement of an organizer and an interim declaration that the employer revert to its past practice of awarding overtime – The Board found that there appeared to be a reasonable basis to conclude that the employer was aware of the organizer's involvement as a union supporter and that its decision to terminate was partly motivated by that – The Board's conclusion was supported by the aggressive position taken by the employer with respect to the union's organizing drive; the timing of the discharge being mere hours after the application for certification was filed; an unaddressed statement that the discharge was the result of a directive from head office; and uncertainty with respect to the interpretation and application of the Attendance policy – The Board also found that the denial of overtime hours to W appeared to be a departure from the employer's past practice which was not unrelated to the exercise of rights under the Act – The Board found the other factors under s. 98, to have been met and made a number of declarations, including reinstatement, and that employees have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support – Declarations made

MILLARD REFRIGERATED SERVICES, INC. RE TEAMSTERS LOCAL UNION NO. 419 406

Intervention – Certification – Construction Industry – Reconsideration – Standing - Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721 358

Judicial Review – Bargaining Unit – Certification – Application by the LIUNA, OPDC (supported by the IUOE) for judicial review of an interim decision by the Board relating

to certifications sought for workers of Graham Bros. Construction Ltd. – In its response to both applications for certification, Graham identified 24 individuals on each of its employee lists – The unions determined that 11 of those individuals were properly on the LIUNA list and 13 were properly on the IUOE list – The IUOE then withdrew its application for certification – The unions argued that because Graham was not permitted by s. 128.1(3) of the Act to file a qualified list, they were entitled to take Graham's list as an unqualified position and reach agreement between themselves on the distribution of the 24 employees – Accordingly, when the applicants agreed 13 names belonged on the IUOE list, Graham was a party to that agreement – The Board found that Graham was not a party to the agreement and that in any event the agreement became irrelevant when the application was withdrawn – The Board directed Graham to provide an unqualified list and allowed LIUNA to respond – LIUNA sought judicial review of the Board's decision – The Court held that the Board did not rule on Graham's ability to provide an unqualified list; the finding that Graham was not a party to the agreement between the unions was reasonable – Application dismissed

GRAHAM BROS. CONSTRUCTION LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL AND IUOE, LOCAL 793 AND OLRB 497

Judicial Review – Certification – Charter of Rights and Freedoms – Construction Industry – Employer Support – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed – On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52 494

Judicial Review – Certification – Construction Industry – Natural Justice – Reconsideration – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

MACKENZIE GROUP CONSTRUCTION INC.; RE PAINTERS LOCAL 1891 504

Judicial Review – Certification – Construction Industry – The Board had found that three site superintendents were members of a bargaining unit, as they were not performing "managerial functions" pursuant to s. 1(3)(b) of the Act – The court found the Board considered the evidence before it; its past jurisprudence on the issue; and it clearly understood the reason for the exclusion was to prevent conflict of interest – Further the Board weighed the evidence and concluded the individuals were working foremen without significant influence over other individuals – The Board's reasons were clear and the conclusions fell within a range of reasonable outcomes, given the evidence – Application dismissed

ROCHON BUILDING CORPORATION RE CARPENTERS COUNCIL 505

Judicial Review – Certification – Employer – Schuit applied for judicial review of two decisions by the Board certifying LIUNA after the employer had failed to respond to the application – In the reconsideration before the Board, Schuit claimed that it did not respond to the application because it was not the employer of the three employees; it had assumed the application was sent to it in error; and it did not appreciate the nature and effect of the application – The Board denied the applicant's request for reconsideration and upheld the original certification – On judicial review, the Court held that the Board was entitled to considerable deference particularly with respect to the exercise of its discretion in the certification process – After considering the employer's reasons for failing to respond to the application, it was reasonable for the Board to exercise its discretion to refuse to reconsider its decision – Application dismissed

SCHUIT PLASTERING & STUCCO INC.; RE UNIVERSAL WORKERS UNION, LIUNA LOCAL 183 506

Judicial Review – Construction Industry Grievance – Non-construction Employer – Timeliness – In a preliminary decision the Board ruled that the grievance was timely; although the grievance was referred late to arbitration under the collective agreement the Board did have the discretion to extend the time for the referral; and it was appropriate to accept the referral to arbitration – Greater Essex sought judicial review of the Board's interim decision and the union brought a motion to quash the application as premature – The court found no exceptional circumstances that would persuade it to hear the application – The court stated that the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point – Motion granted – Application for judicial review quashed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; PLUMBERS LOCAL 52 500

Judicial Review – Employment Standards – Related Employer – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application (see [2006] OLRB Rep. March/April 248) – The application for judicial review was dismissed by the Divisional Court (see [2007] OLRB Rep. July/Aug 842) – First, the Court of Appeal noted the legislative mandate that the courts "not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable," and made it clear that it did not accept the applicants' argument that "the Divisional Court erred in failing to articulate first what in its view

would be the correct interpretation of s. 4 before conducting its reasonableness analysis" – Second, the Court was not persuaded that the OLRB's decision under the current ESA "can be characterized as fitting into two competing incompatible lines of authority" and accordingly found it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions – Finally, the court reiterated that a reasonable decision must be "justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" – The court found the Board's decision met that standard – Appeal dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC; CATELECTRIC INC.; 4064186 ONTARIO INC 480

Judicial Review – Employment Standards – The Board had upheld an ESO's finding that employees of the applicants' group homes were not covered by an exemption for "residential care workers" and therefore were entitled to overtime pay – On judicial review, the Court found that while the Board recognized the purposes of the ESA, it failed to address the purpose of the exemption, namely to facilitate the operation of the group homes, and failed to balance the purpose of the exemption against the purposes of the Act – The Court found it was unnecessary to address the Board's "consideration of whether the residents in questions were 'developmentally handicapped persons' within the meaning of the regulation," as the Court found the Board's decision was not reasonable due to its failure to address the purpose of the exemption – Application allowed; the Court did not remit the matter back to the Board, but substituted its own decision

LORRAINE FRASER VISCOUNT AND KUIPERS RESIDENTIAL HOMES; RE THE DIRECTOR OF EMPLOYMENT STANDARDS, SHIRLEY COYEA AND DANA GRANT AND OLRB 501

Natural Justice – Certification – Construction Industry – Judicial Review – Reconsideration – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

MACKENZIE GROUP CONSTRUCTION INC.; RE PAINTERS LOCAL 1891 504

Non-Construction Employer - Construction Industry Certification – Status – The employer asserted the Board lacked the authority to issue certificates because the employer was a "non-construction employer" – The union argued the Board was not required to determine the non-construction employer issue as part of the certification application and that the employer had to bring a separate application to have that issue addressed – The Board followed *Amica Mature Lifestyles Inc.* finding that the employer's status as a non-construction employer is properly raised in the context of a certification application under s. 128.1 – The Board found nothing in the Act to suggest that the issue of the employer's status as a non-construction employer ought not to be dealt with in the context of a certification application – Indeed the structure of the Act made it clear that the Board could only issue certificates to the union with respect to an employer that is not

a non-construction employer – Therefore the Board determined that the question of status will be decided in the context of the certification application – Matter continues

2095527 ONTARIO LIMITED C.O.B. AS EMBASSY SUITES; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 327

Non-construction Employer – Construction Industry Grievance – Judicial Review – Timeliness – In a preliminary decision the Board ruled that the grievance was timely; although the grievance was referred late to arbitration under the collective agreement the Board did have the discretion to extend the time for the referral; and it was appropriate to accept the referral to arbitration – Greater Essex sought judicial review of the Board's interim decision and the union brought a motion to quash the application as premature – The court found no exceptional circumstances that would persuade it to hear the application – The court stated that the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point – Motion granted – Application for judicial review quashed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; PLUMBERS LOCAL 52 500

Practice and Procedure – Certification – Construction Industry – Related employer – The employer filed its response to the union's challenges, but failed to deliver it to the union, in accordance with the Board's standard direction – The union asserted the employer had accepted the union's position and sought certification – The Board noted that the direction was not required by the Act or its Rules; that there was no consequence set out for a failure to deliver; and that the purpose of the direction was to facilitate discussion between the parties and to prevent gerrymandering the list – Finally, the Board found there was no prejudice to the union – The Board found there was no proper basis to refuse to permit the employer from maintaining their objection to the union's challenges – Matter continues

MANORCORE CONSTRUCTION INC. AND MANACORE HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 400

Practice and Procedure – Certification – Construction Industry – The OPDC filed with the Board its challenges to 12 of the 18 individuals the employer had listed as being employees in the bargaining unit, but failed to deliver the letter to the employer – The employer, referring to the Board's direction in its decision (and Information Bulletin #9), asserted that as the OPDC had not delivered its challenges, the list of employees was settled – The Board noted that neither its direction nor the Information Bulletin sets out any consequences for a failure to comply; that the purpose of the requirement was to prevent gerrymandering; that the employer did not suggest it was prejudiced by not receiving the OPDC's challenges (as the employer was notified about the challenges prior to the Regional Certification Meeting and replied to them) – Accordingly there was no legitimate basis for finding the OPDC's failure to notify the employer in a timely fashion precluded the OPDC from pursuing its challenges – Matter continues

NIACON LIMITED; RE IUOE LOCAL 793; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 436

Practice and Procedure – Construction Industry – Termination – The union was certified on November 14, 2008 – Although the Board received the application for termination on May 15th, pursuant to the Rules, the application was filed on May 14, 2009, the day the applicant sent it by Priority Courier – Pursuant to s. 132(1) an application is untimely if

made within 6 months of certification – The Board found it was clear (according to common law and the *Legislation Act*) that the 6 month period began on November 15th and expired May 14th at midnight – Therefore the application was untimely, having been made on the last day of the six month period – Application dismissed

WHITE CONTRACTING LTD.; RE ERIC PARADIS; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 467

Prima Facie – Health and Safety – The applicant alleged she was terminated by the company's President as a reprisal for raising health and safety concerns – On review of the Board's case law and the pleadings, the Board concluded that the pith and substance of the complaint was that she was unjustly terminated from employment for complaining about the President's verbal abuse (that is, alleged bullying, personal harassment and emotional and psychological abuse), which she found deeply insulting, demeaning and humiliating – Given, however, that there was no indication of the existence of a health and safety nexus the Board exercised its discretion not to inquire into the matter – Application dismissed

TEN STAR FINANCIAL SERVICES; RE SUSAN VOGAN..... 458

Prima Facie Motion – Bargaining Unit – Related Employer – CUPE sought a declaration that the three responding parties constitute a single employer under section 1(4) of the Act – A collaboration involving William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc. resulted in WOHC contracting out certain work to CSI – Certain WOHC employees were as a result terminated and re-hired by CSI – The identical collective agreement applied to both the remaining WOHC employees and the transferred employees but the bargaining structure was altered to form two bargaining units – The issue was whether the Board should exercise its discretion to make a related employer declaration in order to preserve a particular bargaining structure – The responding parties moved that the application be dismissed on the grounds that the applicant had not pleaded a *prima facie* case – The Board found that the parties had clearly turned their minds to the management of contracting out in the very circumstances of this case – There was no evidence of mischief, no suggestion the bargaining unit would be subject to further fragmentation and no facts pleaded that would indicate an inability on the union's part to fully engage in the collective bargaining process – The Board will not exercise its discretion to make a related employer declaration merely to preserve a bargaining structure – Application dismissed

WILLIAM OSLER HEALTH CENTRE, THE HEALTHCARE INFRASTRUCTURE COMPANY OF CANADA INC. AND CARILLION SERVICES INC.; RE CUPE, LOCAL 145..... 470

Privilege – Health and Safety – Suspension – Aecon sought a suspension of part of an Inspector's order requiring Aecon to produce its Incident Investigation Report, which it claimed was covered by solicitor/client and/or litigation privilege – The Board found that a suspension of the Order would not endanger worker safety (there were no preventative measures ordered for the protection of workers and all the other orders had been complied with); the prejudice to Aecon (releasing a document that may be determined to be privileged) outweighed the prejudice to the Inspector; and Aecon has a strong *prima facie* case (the facts set out, if proven, suggest that the document is privileged) – Part of Order Suspended – Appeal to be heard

AECON CONSTRUCTION GROUP INC.; RE CEMENT MASONS LOCAL 598; JIM BONIFACE, INSPECTOR 334

Reconsideration – Certification – Construction Industry – Intervention – Standing - Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721 358

Reconsideration – Certification – Construction Industry – Judicial Review – Natural Justice – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

MACKENZIE GROUP CONSTRUCTION INC.; RE PAINTERS LOCAL 1891 504

Related Employer – Bargaining Unit – *Prima Facie* Motion – CUPE sought a declaration that the three responding parties constitute a single employer under section 1(4) of the Act – A collaboration involving William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc. resulted in WOHC contracting out certain work to CSI – Certain WOHC employees were as a result terminated and re-hired by CSI – The identical collective agreement applied to both the remaining WOHC employees and the transferred employees but the bargaining structure was altered to form two bargaining units – The issue was whether the Board should exercise its discretion to make a related employer declaration in order to preserve a particular bargaining structure – The responding parties moved that the application be dismissed on the grounds that the applicant had not pleaded a *prima facie* case – The Board found that the parties had clearly turned their minds to the management of contracting out in the very circumstances of this case – There was no evidence of mischief, no suggestion the bargaining unit would be subject to further fragmentation and no facts pleaded that would indicate an inability on the union's part to fully engage in the collective bargaining process – The Board will not exercise its discretion to make a related employer declaration merely to preserve a bargaining structure – Application dismissed

WILLIAM OSLER HEALTH CENTRE, THE HEALTHCARE INFRASTRUCTURE COMPANY OF CANADA INC. AND CARILLION SERVICES INC.; RE CUPE, LOCAL 145 470

Related employer – Certification – Construction Industry – Practice and Procedure – The employer filed its response to the union's challenges, but failed to deliver it to the union, in accordance with the Board's standard direction – The union asserted the employer had accepted the union's position and sought certification – The Board noted that the direction was not required by the Act or its Rules; that there was no consequence set out for a failure to deliver; and that the purpose of the direction was to facilitate discussion between the parties and to prevent gerrymandering the list – Finally, the Board found there was no prejudice to the union – The Board found there was no proper basis to refuse to permit the employer from maintaining their objection to the union's challenges – Matter continues

MANORCORE CONSTRUCTION INC. AND MANACORE HOLDINGS INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 400

Related Employer – Employment Standards – Judicial Review – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application (see [2006] OLRB Rep. March/April 248) – The application for judicial review was dismissed by the Divisional Court (see [2007] OLRB Rep. July/Aug 842) – First, the Court of Appeal noted the legislative mandate that the courts "not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable," and made it clear that it did not accept the applicants' argument that "the Divisional Court erred in failing to articulate first what in its view would be the correct interpretation of s. 4 before conducting its reasonableness analysis" – Second, the Court was not persuaded that the OLRB's decision under the current ESA "can be characterized as fitting into two competing incompatible lines of authority" and accordingly found it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions – Finally, the court reiterated that a reasonable decision must be "justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" – The court found the Board's decision met that standard – Appeal dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC; CATELECTRIC INC.; 4064186 ONTARIO INC. 480

Remedy – Duty of Fair Representation – Unfair Labour Practice – The employer awarded a part-time Residential Counsellor position to the applicant H, who had less seniority than V – The collective agreement contained a job-posting clause requiring the employer to award the position to the more senior candidate where there was relative equality on a number of factors – The Union filed a grievance on V's behalf and entered into a settlement with the employer in which V was awarded the position filled by H – H made three allegations: first, the Union failed to properly communicate with him about the status of V's grievance; second, that it was clearly evident that he had better

qualifications and experience and that seniority should not have been a factor; and finally, the union did not communicate properly with him after he learned of the settlement – On the second point, the Board found that there was no "rational pathway" that was evident between the facts, competing interests and the decision made by the union – The union did not undertake a proper investigation to determine whether V's grievance was worthy of pursuit, and therefore whether she should have been awarded the position because of her seniority – The Board found the union's approach was clearly not rational and called out for an explanation—which was not provided – Accordingly, on this point the Board found a violation of s. 74 – The Board was also concerned about the union's failure to advise H of his right to participate at the arbitration of V's grievance, but on the facts was not prepared to make a finding of bad faith, or that it was so reckless as to constitute a violation – Declaration of a breach – Matter referred to Manager of Field Services

HARRIS, DAVE; RE SEIU LOCAL 1.ON; RE YWCA HAMILTON 383

Representation Vote – Bar – Bargaining Unit – Certification – CEP initially applied to certify the utilities department of the employer's employees – The employer disputed the appropriateness of the unit but failed to provide a different unit description and did not file a s. 8.1 objection – Although the CEP won the representation vote, the Board expressed concern about the propriety of the unit applied for, and sought submissions – Following receipt of the employer's submissions, the CEP filed a second application for certification, for a potential craft bargaining unit (operating engineers) – The Board determined that the original unit applied for was not appropriate and ordered a vote in an all-employee bargaining unit in the first application – The CEP then sought to withdraw the first application; the second vote did not take place – The Board addressed two issues: whether any conditions should attach to the withdrawal of the first application, and whether it should refuse to consider the second application – The Board held that when it ordered the second representation vote in the original file, it was signaling that the first vote was not meaningful and could not be considered "the" representation vote contemplated by s. 7(10) of the Act, which would lead to a mandatory bar – Because the bargaining unit voted on in the first vote was not appropriate, there was no expression of employee wishes in an appropriate unit – The union's withdrawal of the application before the second vote could only lead to the discretionary bar found in s. 7(9), and the Board chose not to impose a discretionary bar – Second application for certification referred to Registrar for hearing

GREENFIELD ETHANOL INC.; CEP, LOCAL 203 377

Standing - Certification – Construction Industry – Intervention – Reconsideration – Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour

practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721 358

Standing – Construction Industry – Delay – Unfair Labour Practice – Four members of the IBEW local brought an application against nineteen electrical contractors alleging they interfered in an election of officers to the Local by assisting the incumbent slate in their election efforts – The responding parties brought a motion to dismiss on a number of grounds – The Board found the members had no standing to bring a complaint under s. 72 or 76 as these sections prohibit conduct towards individual employees and the members were not employees nor were they authorized to represent any employees – The Board found however that they did have standing to bring an application alleging a breach of s. 70 since the allegation was arguably an interference in the administration of a trade union, however the Board went on to exercise its discretion not to inquire into the matter for four reasons: first, there was no basis for making a cease and desist order as requested; second, the "rule making and sanctioning role" was not in keeping with the general thrust of the Act; third, the delay was significant in that the complaint was brought well after the time the Board, or the employer, could do anything; finally, while the conduct complained of may breach s. 70, this is also not so plain and obvious – Complaint dismissed

CENTENNIAL ELECTRIC LTD. ET AL; RE ROBERT GULLINS ET AL; DISCOVERY ELECTRIC ET AL; RE IBEW 352

Status – Construction Industry Certification – Non-Construction Employer – The employer asserted the Board lacked the authority to issue certificates because the employer was a "non-construction employer" – The union argued the Board was not required to determine the non-construction employer issue as part of the certification application and that the employer had to bring a separate application to have that issue addressed – The Board followed *Amica Mature Lifestyles Inc.* finding that the employer's status as a non-construction employer is properly raised in the context of a certification application under s. 128.1 – The Board found nothing in the Act to suggest that the issue of the employer's status as a non-construction employer ought not to be dealt with in the context of a certification application – Indeed the structure of the Act made it clear that the Board could only issue certificates to the union with respect to an employer that is not a non-construction employer – Therefore the Board determined that the question of status will be decided in the context of the certification application – Matter continues

2095527 ONTARIO LIMITED C.O.B. AS EMBASSY SUITES; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 327

Suspension – Health and Safety – Privilege – Aecon sought a suspension of part of an Inspector's order requiring Aecon to produce its Incident Investigation Report, which it claimed was covered by solicitor/client and/or litigation privilege – The Board found that a suspension of the Order would not endanger worker safety (there were no preventative measures ordered for the protection of workers and all the other orders had been complied with); the prejudice to Aecon (releasing a document that may be determined to be privileged) outweighed the prejudice to the Inspector; and Aecon has a strong *prima facie* case (the facts set out, if proven, suggest that the document is privileged) – Part of Order Suspended – Appeal to be heard

AECON CONSTRUCTION GROUP INC.; RE CEMENT MASONS LOCAL 598; JIM BONIFACE, INSPECTOR 334

Termination – Construction Industry – Practice and Procedure – The union was certified on November 14, 2008 – Although the Board received the application for termination on May 15th, pursuant to the Rules, the application was filed on May 14, 2009, the day the applicant sent it by Priority Courier – Pursuant to s. 132(1) an application is untimely if made within 6 months of certification – The Board found it was clear (according to common law and the *Legislation Act*) that the 6 month period began on November 15th and expired May 14th at midnight – Therefore the application was untimely, having been made on the last day of the six month period – Application dismissed

WHITE CONTRACTING LTD.; RE ERIC PARADIS; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 467

Termination – Employment Standards – Judicial Review – Related Employer – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application (see [2006] OLRB Rep. March/April 248) – The application for judicial review was dismissed by the Divisional Court (see [2007] OLRB Rep. July/Aug 842) – First, the Court of Appeal noted the legislative mandate that the courts "not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable," and made it clear that it did not accept the applicants' argument that "the Divisional Court erred in failing to articulate first what in its view would be the correct interpretation of s. 4 before conducting its reasonableness analysis" – Second, the Court was not persuaded that the OLRB's decision under the current ESA "can be characterized as fitting into two competing incompatible lines of authority" and accordingly found it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions – Finally, the court reiterated that a reasonable decision must be "justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" – The court found the Board's decision met that standard – Appeal dismissed

ABDURAHMAN ABDOULRAB ET AL; RE NOVAQUEST FINISHING INC; CATELECTRIC INC.; 4064186 ONTARIO INC. 480

Timeliness – Construction Industry Grievance – Judicial Review – Non-construction Employer – In a preliminary decision the Board ruled that the grievance was timely; although the grievance was referred late to arbitration under the collective agreement the Board did have the discretion to extend the time for the referral; and it was appropriate to accept the referral to arbitration – Greater Essex sought judicial review of the Board's interim decision and the union brought a motion to quash the application as premature – The court found no exceptional circumstances that would persuade it to hear the application – The court stated that the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point – Motion granted – Application for judicial review quashed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; PLUMBERS LOCAL 52 500

Unfair Labour Practice – Certification – Charter of Rights and Freedoms – Construction Industry – Employer Support – Judicial Review – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed – On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

PRE-ENG CONTRACTING LTD. AND CONSTAFF CONSTRUCTION LTD.; LIUNA, LOCAL 506; CARPENTERS COUNCIL; CLAC 52 494

Unfair Labour Practice – Certification – Construction Industry – Intervention – Reconsideration – Standing - The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

FLYNN CANADA LTD.; RE IRONWORKERS, LOCAL 721 358

Unfair Labour Practice – Certification – Discharge for Union Activity – Interim Relief – The union, having lost a representation vote, receiving far fewer votes than the membership support it appeared to have on application, sought remedial certification under s. 11, ULP remedies, interim reinstatement of an organizer and an interim declaration that the employer revert to its past practice of awarding overtime – The Board found that there appeared to be a reasonable basis to conclude that the employer was aware of the organizer's involvement as a union supporter and that its decision to terminate was partly motivated by that – The Board's conclusion was supported by the aggressive position taken by the employer with respect to the union's organizing drive; the timing of the

discharge being mere hours after the application for certification was filed; an unaddressed statement that the discharge was the result of a directive from head office; and uncertainty with respect to the interpretation and application of the Attendance policy – The Board also found that the denial of overtime hours to W appeared to be a departure from the employer's past practice which was not unrelated to the exercise of rights under the Act – The Board found the other factors under s. 98, to have been met and made a number of declarations, including reinstatement, and that employees have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support – Declarations made

MILLARD REFRIGERATED SERVICES, INC. RE TEAMSTERS LOCAL UNION NO. 419 406

Unfair Labour Practice – Construction Industry – Delay – Standing – Four members of the IBEW local brought an application against nineteen electrical contractors alleging they interfered in an election of officers to the Local by assisting the incumbent slate in their election efforts – The responding parties brought a motion to dismiss on a number of grounds – The Board found the members had no standing to bring a complaint under s. 72 or 76 as these sections prohibit conduct towards individual employees and the members were not employees nor were they authorized to represent any employees – The Board found however that they did have standing to bring an application alleging a breach of s. 70 since the allegation was arguably an interference in the administration of a trade union, however the Board went on to exercise its discretion not to inquire into the matter for four reasons: first, there was no basis for making a cease and desist order as requested; second, the "rule making and sanctioning role" was not in keeping with the general thrust of the Act; third, the delay was significant in that the complaint was brought well after the time the Board, or the employer, could do anything; finally, while the conduct complained of may breach s. 70, this is also not so plain and obvious – Complaint dismissed

CENTENNIAL ELECTRIC LTD. ET AL; RE ROBERT GULLINS ET AL; DISCOVERY ELECTRIC ET AL; RE IBEW 352

Unfair Labour Practice – Duty of Fair Representation – Remedy – The employer awarded a part-time Residential Counsellor position to the applicant H, who had less seniority than V – The collective agreement contained a job-posting clause requiring the employer to award the position to the more senior candidate where there was relative equality on a number of factors – The Union filed a grievance on V's behalf and entered into a settlement with the employer in which V was awarded the position filled by H – H made three allegations: first, the Union failed to properly communicate with him about the status of V's grievance; second, that it was clearly evident that he had better qualifications and experience and that seniority should not have been a factor; and finally, the union did not communicate properly with him after he learned of the settlement – On the second point, the Board found that there was no "rational pathway" that was evident between the facts, competing interests and the decision made by the union – The union did not undertake a proper investigation to determine whether V's grievance was worthy of pursuit, and therefore whether she should have been awarded the position because of her seniority – The Board found the union's approach was clearly not rational and called out for an explanation—which was not provided – Accordingly, on this point the Board found a violation of s. 74 – The Board was also concerned about the union's failure to advise H of his right to participate at the arbitration of V's grievance, but on the facts was not prepared to make a finding of bad faith, or that it was

so reckless as to constitute a violation – Declaration of a breach – Matter referred to Manager of Field Services

HARRIS, DAVE; RE SEIU LOCAL 1.ON; RE YWCA HAMILTON 383

1889-08-ES 1496161 Ontario Inc. o/a Todd Grier Excavating, Applicant v. Director of Employment Standards, Responding Party

Employment Standards – The employer sought review of the employment standards officer's order finding that the installation of septic tanks/systems was not captured by the Regulation exempting overtime pay until 50 hours per week – The Board found that the installation of the septic systems was not captured by the word sewers in the Regulation for two reasons: first, on a plain reading sewers are conduits or channels for the movement of waste, and are not entire sewage systems – The evidence showed that the key component of the employer's work was the installation of the septic tank, which is not a sewer – Second, on a purposive review of the Act and the regulation, and assuming there was some ambiguity, the Board found that it must construe the regulation narrowly and give it an interpretation that encourages employers to comply with the minimum standards – Application for review dismissed

BEFORE: *Christine Schmidt*, Vice-Chair.

APPEARANCES: *S. Craig Halpenny, Todd Grier, Kathy Grier* and *Douglas B. James* appearing on behalf of the applicant; *Linda H-C Chen* appearing for the Director of Employment Standards.

DECISION OF THE BOARD: June 29, 2009

1. This is an employer application for review pursuant to section 116 of the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "Act").

2. The applicant ("the employer") seeks review of Order to Comply #35779 issued under section 108 of the Act. The Order to Comply is dated August 18, 2008, and is based on section 22 of the Act:

> 22. (1) An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold.

3. The employer takes the position that the applicable overtime threshold which applies to it is 50 hours in each week rather than 44 hours set out in section 22 of the Act. The employer relies on the Special Rules and Exemptions Re Overtime Pay set out in Regulation 285/01 ("the Regulation") of the Act, and in particular section 16 of the Regulation:

> Despite Part VIII of the Act, the employer shall pay an employee who is employed in laying, altering, repairing or maintaining sewers and watermains and in work incidental thereto, or in guarding the site during the laying, altering, repairing or maintaining of sewers and watermains, overtime pay for each hour worked in excess of 50 hours in a work week, at an amount not less than one and one-half times the employee's regular rate.

Issue

4. The issue to be determined is whether or not the installation of "septic systems" by employees of Todd Grier Excavating is captured by the term "sewers" referenced in the Regulation.

Facts

5. The employer is in the business of "residential sewage system installation." It installs private septic systems and operates principally in rural areas in the United Counties of Leeds and Grenville, Frontenac and Lennox and Addington. Eighty percent (80%) of the employer's work relates to the installation of septic systems in residential homes in a rural setting. Mr. Grier described the work undertaken by the employer as "earth works." The work is seasonal in nature, and barring exceptional circumstances (emergencies), takes place in the spring through the fall. It is primarily the weather that affects the scheduling of the employer's work. Unfavourable weather conditions such as rain can result in delays during the employer's months of primary operation and precludes work in the winter months.

6. The process whereby waste is processed by the septic systems the employer installs was described by Mr. Grier. He explained that waste, both liquid and solid, leave the home/building through the internal plumbing system which leads to the "septic tank" installed by the employer. The solid and liquid waste is separated. The solid or effluent waste enters an aeration chamber and the liquid waste exits the tank and goes into a smaller drain field or area bed. Mr. Grier explained that progressive failure of the "on site" disposal system takes place over time despite the maintenance of the self-contained system through the pumping and removal of waste by trucks designed for that purpose.

The Employer's Position

7. Counsel for the employer submits that the septic systems installed for its clients fall "squarely" within the exemption set out in section 16 of the Regulation. Counsel relies on the case of *Re Deckert-Dancy & Associates (Eastern Ltd.)*, 1971 E.S.C 38 and urges the Board to adopt the methodology used by the Referee in that case in making the determination before it. The Referee in the *Re Decker-Dancy* case was tasked with interpreting a section of a regulation to determine whether or not the employer, engaged in the construction of roadbeds used for the laying of railroad rails, fell within the definition of "road building industry" as referenced in the regulation. The referee first explored dictionary definitions of the term "road." Counsel for the employer submitted that wording in that regulation could include the term railroad lines and that the Referee then properly proceeded to assess the "intent" of the regulation in question to come to a final determination in the matter before him.

8. In applying this methodology to this case, counsel for the employer points to four definitions of the term "sewer." Wikepedia defines sewer as follows:

> "Sewer may refer to:
> Sanitary Sewer – a system of pipes used to transport human waste
> Storm Sewer - a collection of transportation system for storm water
> Septic - a septic tank, the key component of a septic system is a small scare sewage treatment system common in areas with no connection to main sewage pipes provide by private corporations or local governments… a septic system generally consists of tanks between the size of 1,000 and 2,000 which is connected to an inlet wastewater pipe at one end and to a septic drain field at the other…"

9. Butterworths, *Words and Phrases Legally Defined* (3rd Edition) Volume 4 (London: Butterworths, 1990) p.174 defines sewer as:

> Apart from statute, the terms sewers and drains have no special technical meanings in law they are words in popular use of somewhat similar connotation meaning channels by which liquid is carried off by gravity. In particular they mean artificial channels for draining water from land or for carrying away waste water and feculent and polluted matter from house and other buildings. In statutes, relating to sanitation a distinction is drawn between sewers and drains. Furthermore, sewer sometimes means more than a mere channel and includes the whole apparatus for drawing off and dealing with water or other liquid. (38 Halsbury's law (4th Ed) para 339).

10. Counsel for the employer also refers the Board to the Merriam-Webster Online Dictionary, www.merriamwebster.com, where sewer is defined as:

> an artificial usually subterranean conduit to carry off sewage and sometimes surface water (as from rainfall).

11. Finally, counsel for the employer points to the extensive definition of "sewage system" outlined in the Building Code, O. Reg.350/06.

> a) a chemical toilet, and incinerating toilet, a self-contained portable toilet and all forms of privy including a portable privy, an earth pit privy, a privy vault and composting toilet system,
>
> b) a greywater system;
>
> c) a cesspool,
>
> d) a leaching bed system, or
>
> e) a system that requires or uses a holding tank for the retention of hauled sewage at the site where it is produced before its collection by a hauled sewage system.

Where these,

> f) have designed capacity of 10,000 litres per day or less,
>
> g) have, in total, a design capacity of 10,000 litres per day or less, where more than one of these are located on a lot or parcel of land, and
>
> h) are located wholly within the boundaries of the lot or parcel of land on which is located the buildings or buildings they serve.

12. Based on these definitions, counsel for the employer submits that the term "sewers," even if strictly read, is broad enough to encompass what is known rurally as septic systems.

13. With respect to the intent of section 16 of the Regulation the employer submits that the Regulation's intent is to provide some relief to employers engaged in seasonal business activities. The employer's work is seasonal. The employer asserts that the challenge to undertake septic system installation work in rural Ontario is the same as that faced in urban Ontario by sewer and watermain contractors. The employer points out that section 16 of the Regulation does not speak to an urban – rural distinction. The employer further submits that the *Employment Standards Act 2000: Policy &*

Interpretation Manual, Thomson Carswell: 2008, p.12-78 (the "Manual") is of some assistance in providing insight into the intent of section 16 of the Regulation to the extent that it includes "farm tile drainage" as watermain construction, but that "plumbing work normally performed by a plumber and sprinkler system installation or repair are not."

14. In addition to the *Re Deckert-Dancy* case, *supra*, the employer also relies on *Machtinger v. HOJ Industries Ltd.*, [1992] S.C.J. No. 41, and the *Interpretation Act*, R.S.O. 1980, c. 29 (now section 64 of the *Legislation Act 2006*, S.O. 2006, c.21) and in particular section 10 referenced therein, to support its submission that section 16 should be interpreted in a large and liberal manner. The employer asks the Board to find "septic systems" as falling within the definition of "sewers" in the Regulation and seeks to have the ESO's Order to Comply rescinded on that basis.

The Director of Employment Standards

15. The Director of Employment Standards ("the DES") submits that the type of work in which the employer engages, namely excavation work and the installation of septic systems is not work captured by section 16 of the Regulation. The DES submits that little weight should be given to the Wikepedia definition of sewer relied on by the employer. The DES agrees with the Butterworth's definition of sewer to the extent that the term has no special technical meaning. The DES points out that unlike "road building" which is defined in section 1 of the Regulation and to which the Special Rules and Exemptions Re Overtime Pay apply in section 13 of the Act, neither the Act, nor the Regulation provide a definition of "sewers and watermains." Moreover, the DES takes issue with the employer's reliance on the Building Code's extensive definition of "sewage system" to assist in determining whether or not a septic system is captured by the Regulation, as it states the purpose the Building Code is fundamentally different from that of the Act.

16. Although the DES also relies on the *Machtinger* case, *supra*, it takes issue with the proposition for which the employer submits the case stands. The DES submits that the purpose of the Act is to protect employees given the inherently unequal bargaining power between employees and employers. Consistent with the remedial intent of the Act, the DES argues that *Re Blais*, [1995] O.E.S.A.D. No. 31 makes clear that exclusions from provisions of the Act should be construed narrowly.

17. The DES submits that the language of section 16 of the Act is not ambiguous and that the work to which the exception applies is "sewer and watermains" work. Counsel for the DES points out that the Regulation as a whole, in its reference to work "incidental thereto," or in "guarding the site" during the work, coincides with the "public interest" which interest is reflected in the language of the Manual. The DES submits that the purpose of the exclusion then, is to provide a limited concession to public works undertaken on public property where the work is largely seasonal. Counsel for the DES contrasts this work which is exempted from section 22 of the Act from the employer's septic system installation work being undertaken on private property. Counsel for the DES points out that any additional costs associated with work undertaken by the employer is properly downloaded to the consumer. Counsel for the DES also makes a "floodgates" argument warning against the Board extending the definition of "sewers" to include the installation of private septic systems.

18. In support of its position, the DES relies on the following cases in addition to the ones cited above: *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, *Re Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, *Re 901975 Ontario Inc. (c.o.b. Agram Garden Centre)*, [2005] OLRB Rep

May/June 339 (June 1, 2005), *Re Drain & Sewer Cleaning Services Ltd. (c.o.b. Drain-All)*, [2005] O.E.S.A.D. No. 768 (July 28, 2005) and *Sullivan on the Construction Statues*, (Fifth ed.) Lexisnexis, 2008.

Decision

19. As stated at the outset of this decision, the issue before the Board is whether or not the employees of Todd Grier Excavating are employed in "laying, altering, repairing or maintaining sewers and watermains and in work incidental thereto, … ." For the employer to succeed in this application for review, it must satisfy the Board that the installation of "septic systems" is encompassed by the work the Regulation describes. "Septic systems," therefore, must be captured by the term "sewers" referred to in the Regulation.

20. For the reasons that follow, the Board has determined that the septic systems installed by Todd Grier Excavating's employees are not "sewers" and that therefore the Order to Comply is affirmed.

21. As pointed out by counsel for both parties, neither the Act nor the Regulation defines the words "sewers" or "watermains." The employer has offered three definitions of the word "sewer" from various sources, and one of "sewage system" all of which, it submits, supports the proposition that septic systems fall "squarely" within the definition of sewers. With respect, the Board disagrees. It also notes at the outset that the Wikepedia definition provided by employer counsel is not a definition from which the Board is prepared to take guidance. Any Wikepedia definition is suspect by virtue of the sources from which information on the site is drawn.

22. In any event, the Board must interpret the term "sewers" in accordance with its plain meaning. As such, the Board points out that the language of the Regulation is "sewers" not "sewage system." There is a clear distinction between these terms. There are many types of sewage systems some of which include sewers and some of which do not. The Board would have no hesitation in finding that the "septic systems" that the employer installs are sewage systems and that were the wording of the Regulation about "laying, altering, repairing or maintaining sewage systems" rather than "sewers and watermains," the employees of Todd Grier Excavating would be covered by such an exemption.

23. The term "sewers," has its own meaning. The Board cannot find that "septic systems" is captured by the term "sewers" for two reasons. First, no component of the "septic system" described in the evidence before the Board can be construed as a "sewer." Nor can the system itself be construed as a "sewer." Secondly, "sewers" are by definition a part of an intricately connected sewage system which is neither a "self-contained" system, nor a system designed for the "on-site disposal" of waste. Septic systems, in contrast, are self-contained, "on site" sewage systems.

24. To elaborate on its first point, sewers are "conduits" or "channels" for the movement of waste, both solid and liquid. While these conduits may typically be found on public property, it is not the private/public property distinction that defines "sewers." And while it is true that sewer and watermain work is generally undertaken by "sewer and watermain" contractors whose work principally involves the excavation and laying of sewers and watermains under roads, it may also involve such work on private property.

25. What is important, and what is a defining characteristic of the term "sewers" is that they are conduits or channels for the movement of waste, both solid and liquid. As explained by Mr. Grier, "septic system" installation, at its core, involves the necessary earth work to allow for the installation of the key component of the "septic system," which is the septic tank. The septic tank is a holding tank. It is neither a channel, nor conduit for the movement of waste - it is a tank.

26. While it is true that waste must get to the tank through what is arguably a "conduit or channel for the movement of waste," the employer adduced no evidence about this part of the septic systems it installs, and in these circumstances the Board is left with the understanding that the conduit from the private dwelling to the tank is a "pipe" rather than a "sewer." The Board notes that the employer did not rely on what the Board understood to be the employer's installation of this part of the septic system to bring its work within the Regulation definition. Likewise and in any event, the liquid waste exiting the tank to the drain field or area bed does not involve any "sewer." Certainly the system as a whole cannot be properly characterized as a "conduit" or "channel" for the movement of waste as those terms are commonly understood.

27. In addition, and as mentioned above, sewers, in their plain meaning are not only conduits or channels for the movement of waste, they also, by definition exist as part of an intricately connected system designed for a purpose contrary to that described by Mr. Grier as an "on site" disposal system. Sewers are not part of a self-contained sewage system but rather conduits that move waste from its source, indeed from various sources, through an intricately connected system, and oftentimes through that system to a treatment plant.

28. The Board has found that on a plain reading, the installation of private septic systems is not captured by the term "sewers." In the Board's view, the result is the same if it examines the purpose of the Regulation in the context of the purposes of the Act as a whole. Clearly Part VIII of the Act provides employees with overtime pay after 44 hours of work in a week. The Special Rules and Exemptions Re Overtime Pay set out a list of seasonal employers that are exempt from paying overtime pay to their employees, until either 50 or 55 hours have been reached in a week. This list includes road building; hotels, motels, tourist resorts, restaurants and taverns; fresh fruit and processing; sewer and watermain construction; local cartage; and highway transport. The purpose of the Special Rules and Exemptions Re Overtime Pay is to provide some flexibility to seasonal businesses. The list is not one of all seasonal businesses and accordingly, it is insufficient for the employer to be involved in a seasonal business to be captured by the exemption. The work must also come within the wording of the Regulation. Had the legislature intended to include septic systems within the Regulation, it could have done so, but it has not.

29. Even assuming there were some ambiguity about whether or not septic systems is captured by the word "sewers" in the Regulation, the Board is of the view that any ambiguous term that is to be defined to determine an exemption's applicability must still be construed narrowly, and an interpretation that encourages employers to comply with the minimum requirements of the Act and extends the protections of this benefit conferring legislation on employees is to be preferred over one that does not (see *Re Machtinger, supra* and *Re Blais, supra*).

30. For the reasons set out herein, when employees of Todd Grier Excavating install septic system on private property, they are not employed in the laying of sewers and therefore the Order to Comply is affirmed and the application for review is dismissed.

0136-08-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **2095527 Ontario Limited c.o.b. as Embassy Suites**, Responding Party

Construction Industry Certification – Non-Construction Employer – Status – The employer asserted the Board lacked the authority to issue certificates because the employer was a "non-construction employer" – The union argued the Board was not required to determine the non-construction employer issue as part of the certification application and that the employer had to bring a separate application to have that issue addressed – The Board followed *Amica Mature Lifestyles Inc.* finding that the employer's status as a non-construction employer is properly raised in the context of a certification application under s. 128.1 – The Board found nothing in the Act to suggest that the issue of the employer's status as a non-construction employer ought not to be dealt with in the context of a certification application – Indeed the structure of the Act made it clear that the Board could only issue certificates to the union with respect to an employer that is not a non-construction employer – Therefore the Board determined that the question of status will be decided in the context of the certification application – Matter continues

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Graham Williamson* and *Sean Marlow* for the applicant; *Stephen Shore, Linda Givens* and *Matthew Badrov* for the responding party.

DECISION OF THE BOARD: June 11, 2009

1. This is an application for certification brought under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended ("the Act"). This application was filed with the Board pursuant to section 128.1 of the Act.

2. This matter came on for hearing before me on June 5, 2009 to deal with a preliminary issue raised by the responding party ("Embassy Suites").

3. The applicant (the "Labourers") applies for its "standard" construction industry ICI bargaining unit. It seeks to secure from the Board certificates that will provide it with bargaining rights on behalf of all construction labourers in the employ of Embassy Suites in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Embassy Suites in all other sectors of the construction industry in Board Area No. 5, save and except non-working foremen and persons above that rank.

4. The issue, put shortly, is as follows. Embassy Suites asserts that the Board lacks the authority to issue certificates to the applicant because it is a "non-construction employer" for the purposes of section 128.1 of the Act. It asserts that the Board is required to dispose of the issue of its non-construction employer status up front, as part of this application for certification. The Labourers, on the other hand, asserts that the Board is not required to determine this issue as part of this proceeding, and that as a matter of sound labour relations practice it ought not to do so. It asks that it be granted certificates to represent the construction labourers of Embassy Suites based on the material before the Board, and asserts that the issue of Embassy Suites' potential status as a non-construction employer

can be dealt with should Embassy Suites raise it in a separate proceeding brought pursuant to section 127.2 of the Act.

5. The applicant elected to have this application dealt with under section 128.1 of the Act rather than under section 8 of the Act, in accordance with subsection 128.1(1) of the Act. Subsection 128.1(1) of the Act reads as follows:

> A trade union applying for certification as bargaining agent of the employees of an employer may elect to have its application dealt with under this section rather than under section 8.

Subsection 126(1) of the Act contains certain definitions that apply to the construction industry provisions of the Act, including subsection 128.1(1) of the Act. The two critical definitions for the purposes of the argument made by Embassy Suites are those of "employer" and "non-construction employer". Those definitions read as follows:

> "employer" means a person other than a non-construction employer who operates a business in the construction industry, and for purposes of an application for accreditation means an employer other than a non-construction employer for whose employees a trade union or council of trade unions affected by the application has bargaining rights in a particular geographic area and sector or areas or sectors or parts thereof;
>
> ...
>
> "non-construction employer" means an employer who does no work in the construction industry for which the employer expects compensation from an unrelated person;

6. The arguments made by the parties are set out in summary fashion below.

7. Embassy Suites asserts that the Labourers can only avail itself of the card-based process reflected by section 128.1 of the Act if it is an "employer" for the purposes of that section of the Act. For the purpose of section 128.1 of the Act, an entity is not an "employer" if it is a non-construction employer as defined by subsection 126(1) of the Act. Embassy Suites asserts that it was a non-construction employer on the application filing date, and therefore that the application ought to be dismissed. Moreover, Embassy Suites states that as a result of the above-referenced statutory provisions, the Board is required to consider the question of its status as a non-construction employer as part of this proceeding. It states that its status must be determined by the Board in this proceeding before any certificates may be issued to the Labourers and that it is not required to file a separate application pursuant to section 127.2 of the Act.

8. In support of its position, Embassy Suites relies upon the decision of the Board in *Amica Mature Lifestyles Inc.*, 2009 CanLII 15068, decision dated March 31, 2009. In that case (also an application for certification pursuant to section 128.1 of the Act) one question before the Board was whether two of the responding parties could each assert that it was a non-construction employer in the absence of a non-construction employer application and prior to the establishment of bargaining rights. The Board held that they could, and provided the parties with the following oral ruling:

Having considered the submissions of the parties, I am satisfied that the Board does have jurisdiction in the context of the present certification application filed under section 128.1 of the Act to consider the issue raised by Amica Whitby and AMLI to the effect that they are both non-construction employers within the meaning of section 126 of the Act and as such not an employer within the meaning of section 128.1 of the Act. While the applicant is correct that section 127.1 and 127.2 of the Act contemplate the existence of bargaining rights, the issue of the responding parties' non-construction employer status does not arise as a result of those provisions. The responding parties are not seeking a declaration under section 127.2 of the Act. Rather, they contend that the applicant cannot seek certification under section 128.1 of the Act in respect of any of their employees (regardless of whether those employees were performing the work of a construction labourer on the date of application) because they are not an "employer" within the meaning of section 128.1(1) of the Act. In *Renu Recycling Inc.*, [2007] OLRB Rep. January/February 177, the Board addressed a similar argument in the context of an outstanding construction certification application and dealt with the issue of whether the responding party to that application was a non-construction employer before any bargaining rights were established. Although the Board in that case did not expressly address the jurisdictional issue, it considered the non-construction employer status of the responding party in that case in the same context that it arises in the present one, which relates to an outstanding construction certification application. I am not further persuaded by the applicant's submission that the Board's consideration of that issue in that case in the context of an outstanding construction industry certification application and in the absence of bargaining rights was wrong. To the extent that the Board made *obiter* comments in *Esso Imperial Oil Ltd.*, [1998] O.L.R.D. No. 2286, at paragraph 14 and 15 of that decision (made prior to the enactment of the non-construction employer provisions) suggest otherwise, I respectfully disagree with those comments. I am also not persuaded that the other decisions referred to by the applicant stand for the proposition that the applicant urges me to adopt, being that the Board has no jurisdiction to entertain whether a responding party to a construction certification application is a non-construction employer within the meaning of the Act before bargaining rights are established. Neither *Scarborough Shopping Centre Ltd.*, [2001] OLRB Rep. November/December 1443 nor *Independent Electricity Market Operator*, [2005] O.L.R.D. No. 243 involved construction certification applications. Instead, both of those cases dealt with applications filed under section 69 and 1(4) and applications filed under section 127 of the Act. There was therefore no issue in those cases as to whether the responding parties were "employers" as defined under section 126 of the Act for the purposes of a construction certification application. Although the Board's decision in *Swift Railroad Contractors*, [2009] O.L.R.D. No. 316 did deal with the issue of the responding parties' status as a non-construction employer in the context of a construction certification application, that issue became moot in that case by virtue of the Board's finding that the individuals whose status was in dispute were not performing work in the construction industry.

In the circumstances of this case, I am satisfied that the Board can and should address the contention of Amica Whitby and AMLI that they are not an "employer" within the meaning of section 128.1(1) of the Act as defined in section 126 of the Act. The Board therefore directs Amica Whitby and AMLI to file particulars of their respective positions in that regard with the Board and copied to the other parties within ten (10) working days from March 30, 2009.

> While it is premature at this stage to definitively determine the appropriate order of proceedings in the absence of submissions from all of the parties concerning that issue and prior to the provision by Amica Whitby and AMLI of their particulars on the non-construction employer issue, it appears to the Board at this stage that there are at least some issues which remain outstanding in these applications that would need to be addressed before the Board would entertain the non-construction employer issue.

Counsel for Embassy Suites asserts that there is no meaningful difference between this proceeding and *Amica*, and that the Board ought to decide the issue in this proceeding by adopting the approach taken by the panel of the Board in the latter proceeding.

10. The Labourers assert that the position taken by Embassy Suites makes little sense from a labour relations policy perspective. Counsel for the Labourers argues that the Board has historically underscored the importance of disposing of representation proceedings as quickly as possible, consistent with one of the purposes of the Act, namely the facilitation of collective bargaining between employers and trade unions that are the freely-designated representatives of the employees. Counsel argued that to establish a process within which a responding party's non-construction employer status is dealt with as part and parcel of a representation proceeding that would otherwise be successful makes a mockery out of the certification process, undermining and defeating the rights of employees under the Act.

11. Counsel submitted that if the Labourers had filed its application under section 8 of the Act it would likely have been entitled to its certificates without the need to deal with the non-construction employer status issue as part of the application for certification. Embassy Suites would have had no option in those circumstances but to file a non-construction employer application pursuant to section 127.2 of the Act, separate and apart from the certification proceeding. Counsel submitted that the Board ought not to interpret the Act in such a way as to make the certification process considerably slower for the sole reason that an applicant chose to file its application pursuant to section 128.1 of the Act.

12. Finally, in the event that the Board were inclined to rule in favour of the position taken by Embassy Suites, counsel for the Labourers argued in the alternative that Embassy Suites had not pleaded any material facts in support of its assertion that it is a non-construction employer for the purposes of the Act. Counsel asserted that Rule 2.4 of the Board's Rules of Procedure precludes Embassy Suites from pleading and relying upon any material facts at this time, unless the Board were to allow it to do so. Counsel stated that given the delay since the filing of the application in April, 2008, there is no obvious reason why the Board ought to feel inclined to allow Embassy Suites to file any material facts and particulars at this time.

13. The Labourers brought the following cases to the attention of the Board: *Esso Imperial Oil Ltd.*, [1998] O.L.R.D. No. 2286, *Scarborough Shopping Centre*, [2001] OLRB Rep. November/December 1443 (December 19, 2001); *Independent Electricity Market Operator*, [2005] O.L.R.D. No. 243 (February 1, 2005); *ReNu Recycling Inc.*, [2007] OLRB Rep. January/February 177 (January 26, 2007) and *Swift Railroad Contractors Corp.*, [2009] OLRB Rep. January/February 131 (January 27, 2009). It asserts that the *Amica* decision relied upon by *Embassy Suites* was wrongly decided.

14. For the reasons that follow, I am of the view that the issue of Embassy Suites' status as a non-construction employer is properly raised by Embassy Suites in the context of this application for certification.

15. I appreciate the concerns raised by counsel for the Labourers. There is no doubt that litigating the question of whether Embassy Suites is a non-construction employer in the context of this application for certification will delay the final disposition of this application, and therefore the final determination of whether the Labourers is entitled to represent a `bargaining unit of construction labourers employed by Embassy Suites. One of the purposes of the Act is to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees. Another purpose of the Act is to promote the expeditious resolution of workplace disputes. The Labourers' assert that it has established that it is the freely-designated representatives of the three employees in question, and ought to be able to get on with representing them. If ultimately the position taken by Embassy Suites is unsuccessful, the Labourers will be correct in that assertion, and these purposes of the Act will not have been, to some extent, achieved.

16. That stated, the position taken by each party to this proceeding is justifiable, depending upon the perspective of that party. From the perspective of the Labourers, it would be far preferable for the Board to grant it certificates now, to deal with the question of the status of Embassy Suites in a subsequent, separate proceeding that may be launched by Embassy Suites, and to have its bargaining rights terminated in the future should Embassy Suites be able to establish its status as a non-construction employer in any subsequent proceeding. If the non-construction employer question is dealt with in this proceeding and is ultimately decided against Embassy Suites, the Labourers will have been denied its bargaining rights for a significant period of time.

17. On the other hand, if the position taken by Embassy Suites is ultimately successful, it would assert that it ought never to have been bound to the Labourers' Provincial ICI collective agreement for the duration of the time that it takes to determine its non-construction employer status, and that it ought never to have been required to bargain with the Labourers to reach a collective agreement, to the extent that non-ICI bargaining rights have any relevance. If certificates were to issue immediately there can be no doubt that the Labourers would assert its right to work. If ultimately it were to be determined that certificates ought not to have been granted, Embassy Suites would have been prejudiced in the meantime.

18. To put it simply, the Labourers' would prefer the consequences of the delay inherent in determining Embassy Suites' status as a non-construction employer to fall on the shoulders of Embassy Suites. Embassy Suites, on the other hand, would prefer the consequences of that delay to fall on the shoulders of the Labourers.

19. In my view, the most important consideration in determining the appropriate response to this issue is the wording of the Act. The wording of the Act unequivocally supports the position taken by Embassy Suites. The card-based certification process that is reflected by section 128.1 of the Act is applicable only to applications for certification in the construction industry. Subsection 128.1(1) of the Act clearly gives an applicant union the option to elect to file its construction industry application for certification under section 128.1, but limits such applications to those involving a "trade union" (defined by subsection 126(1) of the Act to mean "a trade union that according to established trade union practice pertains to the construction industry") applying for certification as bargaining agent of an "employer" (defined by subsection 126(1) of the Act to mean "a person other than a non-

construction employer who operates a business in the construction industry ..."). The Act permits access to certification under section 128.1 of the Act without a representation vote only if a "construction industry trade union" files an application for certification relating to a "construction industry employer" - which by definition excludes a "non-construction employer".

20. There is nothing contained in the Act that leads me to conclude that the question of Embassy Suites' status as a non-construction employer ought not to be dealt with in the context of an application for certification in which that status arises as an issue. In fact, the structure of section 128.1 of the Act makes it clear that this question must be dealt with in the context of this proceeding. The two certificates sought by the Labourers may only be granted under subsection 128.1(13)(a) of the Act if the application for certification is brought with respect to a person that is not a non-construction employer. In the face of a live issue regarding the non-construction employer status of the responding party to the application, the Board could not legitimately issue certificates to the Labourers pursuant to subsection 128.1(13)(a) of the Act. This is a question of jurisdiction. It is not a situation that allows for the Board to do what makes "sense".

21. Counsel for the Labourers noted during argument that had his client brought this application for certification under section 8 of the Act, it could well have established its right to certificates to represent the construction labourers of Embassy Suites without the need to deal with the question of whether Embassy Suites is a non-construction employer as part of that application. Whether that assertion is, in fact, accurate is a question that I do not have to decide. The Labourers elected to have this application dealt with under section 128.1 of the Act, as it is entitled to do. By doing so the Labourers subject itself to both the benefits and the burdens contained in that section.

22. The cases relied upon by the Labourers in support of its position do not really assist it. As noted by the Board in *Amica*, cited above, the comments made by the Board in the *Esso Imperial Oil* case were made before the statutory provision that enacted what is now section 128.1 of the Act was in force. As a result, the motion brought by the employer in that proceeding was dismissed because it was premature. The Board's comments regarding the scope of section 127.2 of the Act were both *obiter* and were made in the absence of the same argument made by counsel for Embassy Suites in this proceeding, and therefore do not hold any weight as a precedent for the purposes of the issue raised here.

23. In both *Scarborough Shopping Centre Ltd.* and *Independent Electricity Market Operator* the Board determined to defer the consideration of applications made pursuant to section 127.2 of the Act pending a decision in one or more related employer/sale of a business applications filed in each case. To do so obviously made sense, in that the section 127.2 application would be unnecessary if no bargaining rights were established in the entity that was asserted to be a non-construction employer. However, in those two proceedings the question that arises in this proceeding – whether the responding party meets the definition of "employer" contained in subsection 126(1) of the Act – does not appear to have been in issue. In *ReNu Recycling Inc.* the Board approached the question of the responding party's non-construction employer status in the same fashion as Embassy Suites submits should be done here, though the Board did not expressly deal with the question of whether the employer in those certification proceedings ought to be permitted to do so as part of those proceedings. Finally, in *Swift Railroad Contractors Corp.*, the issue was raised but ultimately became moot as a result of a finding that the employees' whose status was in dispute were not performing work in the construction industry on the application filing date.

24. Having regard to all of the above, I am satisfied that the position taken by Embassy Suites has merit. The question of its status as a non-construction employer must be dealt with in the context of this proceeding.

25. As noted above, the Labourers' asserts that because Embassy Suites has not pleaded material facts in support of its position, it ought to be precluded from doing so at this time in accordance with Rule 2.4 of the Board's Rules of Procedure. Counsel for Embassy Suites, in response, noted that the Board in *Amica*, cited above, did not preclude the two responding parties from pleading particulars of their assertions after the decision was made to permit the argument to proceed. He submitted that I ought to make the same ruling here. In addition, counsel for Embassy Suites noted that a number of preliminary issues were recently determined by the Board in this proceeding on the basis of a Request for Reconsideration filed by his client, and that had one of those issues been decided in favour of his client, this application may have been dismissed and it would have been unnecessary for it to plead any facts in support of this issue. Because it was not clear to Embassy Suites that the non-construction employer issue would remain live, its failure to plead full material facts in support of its position could be explained.

26. Rule 40.7 of the Board's Rules of Procedure permits the Board to relieve against the strict application of the Rules where it considers it advisable to do so. Considerations such as the extent of the delay, the explanation for it, and the relative prejudice to the parties caused by the delay are relevant in determining whether the Board should exercise its discretion under Rule 40.7 to permit a party to plead and to rely upon material facts that are not disclosed in a timely manner.

27. Here, Embassy Suites identified the non-construction employer issue in its response, so the Labourers' were notified shortly after this application was filed that Embassy Suites was taking the position that it currently takes. Given the limited two-day time period for delivering a response to an application for certification, it is perhaps a little much to expect a responding party to plead in its response all of the facts it relies upon to assert that it is a non-construction employer. However, since that time Embassy Suites has not pleaded anything in support of its position beyond the bare assertion in its response that it is a non-construction employer for the purposes of the Act. Although it is fair to say that there were other preliminary issues being considered by the Board up to March 11, 2009 which could have made the "non-construction employer" issue moot, it would have taken relatively little effort for Embassy Suites to have set out in a letter the basis for its position. The basic material facts relied upon could have been communicated by Embassy Suites to the Labourers and filed with the Board without much time or expense on its part.

28. That stated, it does not appear that the Labourers has encountered any significant prejudice as a result of the failure by Embassy Suites to plead all material facts in support of its position that it is a non-construction employer for the purposes of the Act. Counsel for the Labourers did not suggest during the course of argument that any such prejudice had been incurred by his client as a result of the delay. In the absence of some significant prejudice to the Labourers arising from the failure by Embassy Suites to plead its material facts, I am not prepared to preclude Embassy Suites from pleading those material facts in support of its position that it is a non-construction employer for the purposes of the Act. The consequences of not permitting Embassy Suites to do so are serious, and there does not appear to be any significant prejudice befalling the Labourers should Embassy Suites be entitled to plead those facts.

29. As a result, I exercise my discretion pursuant to Rule 40.7 to permit Embassy Suites to plead all material facts in support of its position that it is a non-construction employer for the purposes of the Act. Embassy Suites is to do so forthwith.

30. At the hearing of this proceeding, counsel agreed that should it ultimately be determined that Embassy Suites ought to be entitled to plead and argue this issue in the context of this proceeding, a conference call to discuss the production of documentation should be scheduled. The Registrar is directed to arrange for such a conference call as soon as practicable.

31. In that regard, I will remain seized of this proceeding to deal with any pleading and documentary production issues. However, I am not seized of this proceeding on the merits.

0697-09-HS; 0509-09-HS Aecon Construction Group Inc., Applicant v. Cement Masons - Local 598, Jim Boniface, Inspector, Responding Parties

Health and Safety – Privilege – Suspension – Aecon sought a suspension of part of an Inspector's order requiring Aecon to produce its Incident Investigation Report, which it claimed was covered by solicitor/client and/or litigation privilege – The Board found that a suspension of the Order would not endanger worker safety (there were no preventative measures ordered for the protection of workers and all the other orders had been complied with); the prejudice to Aecon (releasing a document that may be determined to be privileged) outweighed the prejudice to the Inspector; and Aecon has a strong *prima facie* case (the facts set out, if proven, suggest that the document is privileged) – Part of Order Suspended – Appeal to be heard

BEFORE: *Mark J. Lewis*, Vice-Chair.

DECISION OF THE BOARD: June 23, 2009

1. Board File No. 0697-09-HS is an application under section 61(7) of the *Occupational ealth and Safety Act, R*.S.O. 1990, c. O.1, as amended (the "Act") seeking the suspension of part of Order No. 1 issued by inspector Jim Boniface (the "Inspector") in Field Visit No. 5381810 on April 24, 2009 ("Order No. 1"). The applicant ("Aecon") has also filed an appeal of various orders, set out in various Field Visits, issued by the Inspector on April 22 and 24, 2009. Order No. 1 forms part of Aecon's broader appeal. The appeal has been assigned Board File No. 0509-09-HS but this decision deals only with the suspension request.

2. Both the Inspector and Operative Plasterers' and Cement Masons' and Steeplejacks' International Association of the United States and Canada, Local 598 (the "Union"), which represents certain employees at work on the jobsite which Order No. 1 relates to, have filed responses to this suspension request.

FACTS

3. Most of the facts which are relevant to this request are not in dispute.

4. Aecon is currently engaged as a contractor on a construction project located at 125 Queens Quay Street East, Toronto (the "Project").

5. On April 22, 2009, the Inspector visited the project in order to investigate a workplace incident involving a fall by an employee of Structform Floor Finishing Limited. Structform Floor Finishing Limited, whose employees are represented by the Union, was performing work on the project as a subcontractor to one of Aecon's subcontractors, Structform International Limited. During the course of this visit the Inspector issued various orders to Aecon and both subcontractors.

6. On April 24, 2009, the Inspector returned to the project and once again issued various orders to Aecon and the two subcontractors. The orders issued by the Inspector on April 24th included Order No. 1 which states as follows:

> An inspector may, for the purposes of carrying out his or her duties and powers under this act and the regulations, (c) require the production of any drawings, specifications, licence, document, record or report, and inspect, examine and copy the same. The constructor Aecon Buildings to provide to this Inspector copy of the Incident Investigation Report and copies of Joint Health & Safety Committee Meeting Minutes for last four months.

7. As noted above, Aecon has filed an appeal with respect to a number of the Inspector's April 22nd and 24th orders but this suspension request only concerns that portion of Order No. 1 which relates to the Aecon's *Incident Investigation Report* (the "Report"). Specifically, Aecon objects to providing the Report to the Inspector as it claims the Report is covered by solicitor client and/or litigation privilege. In this respect Aecon's counsel has specifically stated that the Report was prepared after:

(a) the incident in which the employee was injured had occurred;

(b) the Inspector's investigation of the incident had commenced; and,

(c) Aecon had retained counsel to act for it with respect to both the incident and the investigation.

8. Further, Aecon's counsel asserts that the Report was been *reviewed and commented on by counsel* for various purposes including in anticipation of future litigation concerning charges under the Act which may be laid against Aecon.

The Factors used by the Board in Considering a Suspension Request

9. In *The Regional Municipality of Hamilton-Wentworth,* [1998] OLRB Rep. Aug. 709, the Board stated that:

> Three factors have generally been considered by the Board when determining whether a suspension of an Order No. 1 is appropriate in the circumstances:
>
> a) whether the suspension of the Order No. 1 (or, alternatively, the failure to suspend the Order No. 1) would endanger worker safety;

b) the prejudice to the parties if the Order No. 1 is or is not suspended; and

c) whether there is a strong *prima facie* case for a successful appeal of the Order No. 1.

10. The onus lies upon the party requesting the suspension of an Order to establish that the suspension should be granted. Some deference is afforded to decisions made by Inspectors (a consideration which is sometimes dealt with by the Board as being an independent, fourth, factor). In the absence of some persuasive reason to interfere with the Order pending the hearing of the appeal on the merits, the Order should not be suspended. See *R.J. Dungey & Sons Ltd.*, [1999] OLRB Rep. Jan./Feb. 82.

11. The Union's position in this matter can best be described as a *watching brief* in that its response contains no substantive submissions on any of the above noted factors. Therefore, other than noting that the Union very clearly has not asserted that granting this suspension request would affect the health and safety of the workers (its members) on the project, I will not make any further reference to its response. Aecon and the Inspector have made the following submissions regarding the Board's three factors set out above.

Would the Suspension of Order No. 1 Endanger Worker Safety?

12. Aecon asserts that there will be absolutely no adverse impact on the health and safety of the workers if its suspension request is granted because it only pertains to the production of a document prepared by Aecon following the April 22nd incident. It notes that Order No. 1 does not require Aecon to take any action or to take any measures to alter the workplace or work procedures to prevent a reoccurrence of the incident. In this respect, Aecon also notes that the portion of Order No. 1 which concerns the Joint Health and Safety Committee's meeting minutes and all of the other orders issued by the Inspector on April 22nd and 24th, including those which required any form remedial action, are not the subject of this suspension request and have been complied with, whether or not they have been appealed.

13. The Inspector asserts that he is unable to conclude that the health and safety of workers will not be affected if Order No. 1 is suspended. He notes that the investigation of the incident is ongoing and that, until such time as he has all of the details, the cause of the incident cannot be established. The Inspector asserts that it is not possible to determine if the conditions and circumstances that gave rise to the incident persist until the cause of the incident has been established and that as such workers may continue to be in danger.

What is the Prejudice to the Parties if Order No. 1 is not Suspended?

14. Aecon submits that it will be irreparably prejudiced if the suspension is not granted because it will have to produce a document which it claims is subject to privilege before it has had an opportunity to make its submissions on this point. If it is required to do this, Aecon submits that the prejudice in producing the Report will be fully realized and its appeal will be rendered moot. In this respect it must be noted that Aecon faces the possibility of prosecution under the Act if the suspension is not granted and it does not produce the Report to the Inspector.

15. Conversely, Aecon asserts that there will be no prejudice to the Inspector if this portion of Order No. 1 is suspended. It notes that, other than with respect to providing the Report, all parties have cooperated completely with the Inspector. It submits that the Inspector has been provided with all of the other documents requested and that he is now, and always has been, in a position to fully and completely investigate the incident.

16. In response, the Inspector claims that failing to grant the suspension will have no negative impact upon Aecon. He submits that if no charges are laid against Aecon as a result of the April 22nd incident then his possession of the Report will be a *non-issue*. Alternatively, he states that if charges are laid and the Report is subsequently found to be privileged then it will not, and cannot, be used against Aecon at trial.

Is there a strong P*rima Facie* case for a Successful Appeal of Order No. 1?

17. Aecon asserts that it is very likely to be successful with respect to this aspect of its appeal. It submits that the Report is clearly subject to both solicitor-client and litigation privilege given that it was created after the incident, after the investigation had commenced and after counsel had been retained and given that the Report was provided to, and reviewed by, counsel in contemplation of charges under the Act being filed against Aecon. It submits that the Board has long recognised the importance of preserving privilege in a number of contexts including with respect to orders issued under section 54(1) of the Act.

18. The Inspector does not claim that he is entitled to the Report if it is in fact privileged. Rather, he submits that Aecon has simply made the bald allegation that the Report is privileged but has provided no evidence that this is the case. Therefore, and as the onus in both this request and the appeal lies with the applicant, he asserts that Aecon has failed to establish that it has any basis, yet alone a strong *prima facie* case, for a successful appeal of Order No. 1.

DETERMINATION

19. The issue to be determined in this application is whether, considering the three factors set out in *Hamilton-Wentworth, supra*, Aecon should be required to produce to the Inspector the Report sought by him as part of Order No. 1 before it has had an opportunity to make its arguments in its appeal of this Order, and more specifically its arguments concerning privilege. I find that Aecon should not be required to produce the Report at this stage, for the following reasons.

20. First, and most importantly, it does not appear that the health and safety of any worker will be endangered if the suspension is granted. The portion of Order No. 1 that forms the subject of this request pertains only to the production of a document which appears to constitute, or at least form part of, Aecon's internal investigation process. Order No. 1 does not require Aecon to take any preventative measures to protect the health and safety of the workers. All of the other orders issued by the Inspector on April 22nd and 24th, including all of the orders that impose any such preventative measures, along with that portion of Order No. 1 that does not concern the Report, have been complied with. Further, the Inspector has seen fit to allow work to continue at the project despite the fact that he has not been provided with the Report. Accordingly, the health and safety concern factor does not prohibit granting the suspension.

21. I do not find that granting the suspension will prevent the Inspector from conducting his investigation or issuing further remedial orders. The Inspector issued a number of other orders requesting other documents. Aecon has complied with those orders, along with that portion of Order No. 1 that does not relate to the Report, and has provided the requested documents to the Inspector. It would appear that the Inspector has received almost everything that he asked for. Therefore, this is not a case where a company has refused to provide any documents or information to an inspector with the result that he or she is unable to assess whether the health and safety of the workers is endangered. The Inspector has not alleged that Aecon has been obstructive in any way. To the contrary, the facts appear to indicate that Aecon has been co-operative. Accordingly, it appears that the Inspector has sufficient information to determine whether any further remedial orders are required.

22. Aecon will bear the full burden of the prejudice if it is required to provide the Report to the Inspector before it has had an opportunity to argue its case. If this request is not granted Aecon could face charges under the Act if it does not produce the Report and once this document over which it asserts privilege is provided to the Inspector its appeal will be rendered moot. As this Board has repeatedly noted the concept of privilege, including both solicitor-client and litigation privilege, serves an important role within our legal system, namely to allow parties to communicate freely and fully with counsel and to prepare for actual and/or anticipated litigation. Requiring production in the face of, but prior to determining, a claim of privilege would have a large negative effect upon, if not entirely eliminating, the very purposes that the concept of privilege was developed to protect and promote. This prejudice outweighs the prejudice that the Inspector states that he will face if the suspension request is allowed. As noted above, Aecon has provided almost all of the information that the Inspector requested as part of the investigation, and the suspension will only be temporary, until it has been determined, on the merits, with all parties having an opportunity to present their submissions, whether or not Aecon is required to provide the Report.

23. I also find that there is a strong *prima facie* case to grant the suspension. As noted above, the Inspector has not asserted that he is entitled to the Report if it is in fact privileged but argues that there is no evidence upon which to reach such a conclusion. With respect, I disagree.

24. It is not my task, within the context of this suspension request, to definitively conclude whether or not the Report is privileged. That will be done as part of the appeal of Order No. 1. At this point what the Board is required to do is simply to assess the relative strength of, rather than actually determine, the applicant's case for its appeal. Here Aecon has set out a series of facts concerning how and why the Report was created which, if they are true and proved before the Board, would, at the very least, strongly suggest that it is a privileged document. If it is then, as even the Inspector appears to agree, Aecon cannot be required to produce it. Therefore, Aecon has set out an extremely forceful *prima facie* case for appeal and, given that the issue to be determined in this appeal, namely is the report privileged, is primarily legal in nature, rather than being directly related to the Inspector's onsite observations and conclusions, there is no compelling reason to extend any great deference to his decision concerning the production of this Report.

25. Accordingly, given my findings that the health and safety of the workers will not be endangered, that Aecon faces the possibility of severe prejudice and that there is a strong *prima facie* case for the appeal, it is appropriate to grant the suspension and to allow the issue to be adjudicated thereafter.

DISPOSITION

26. The portion of Order No. 1 in Field Visit No. 07735840 that relates to the production of the Incident Investigation Report is hereby suspended pending Aecon's appeal of Order No. 1 on the merits and Board File No. 0509-09-HS, being Aecon's appeal on the merits of Order No. 1 (and certain other orders), is hereby forwarded to the Registrar to be dealt with in accordance with the normal procedures of the Board.

27. I am not seized of this matter.

2158-08-G Sheet Metal Workers' International Association, Local 473, Applicant v. **Bruce Power LP**, Responding Party

Construction Industry Grievance – Seven grievors were suspended for a variety of days for distributing inappropriate emails over the employer's system – The union and grievors acknowledged that the distribution of the emails in question was inappropriate and constituted cause for discipline; the only issue was quantum of discipline imposed – In deciding not to substitute any lesser penalties for the suspensions imposed, the Board noted that: an employer has an interest and obligation to prevent a poisoned work environment and maintain one that is free from harassment; the emails were to varying degrees very offensive; the fact the emails were sent to individuals who may not have been offended was not relevant; no "warning shot" was necessary since the grievors were all fully aware of the employer's policy; and the way the employer determined the penalty was not arbitrary – The length of the suspensions were all within the range of reasonableness and the Board was not persuaded to change the discipline imposed – Grievance dismissed

BEFORE: *Diane L. Gee*, Alternate Chair.

APPEARANCES: **John Moszynski, John Barltrop** and **Alan McQuillan** for the applicant; *Daniel Leone, Sarah Diebel, Rodger Urbshott, John Gallop* and *Doug Wilson* for the responding party.

DECISION OF THE BOARD: June 11, 2009

1. This is a referral of a grievance to arbitration pursuant to section 133 of the *Labour Relations Act* (the "Act").

2. The following seven grievors were disciplined by Bruce Power for having distributed inappropriate emails over Bruce Power's email system as follows:

John Barltrop	six-day suspension
Ric Bates	one-day suspension
John Cameron	six-day suspension
Wayne Hackett	three-day suspension
Brian Jones	three-day suspension
John Rumford	twelve-day suspension

John Watson six-day suspension

3. The Union does not contest that Bruce Power had cause to discipline the grievors. The Union asks that I exercise my discretion pursuant to section 48(7) of the Act and substitute a lesser penalty.

4. The Union agreed to the facts as set out in Bruce Power's response to the grievance referral. As a result, the only witness called by either party was Doug Wilson, a Labour Relations consultant employed by Bruce Power. Mr. Wilson gave testimony concerning the timing of events and the manner in which the amount of discipline imposed was determined. Mr. Wilson testified in a forthright manner and I have no reason to doubt the truthfulness of his testimony.

5. As stated above, the facts are largely not in dispute. Having regard to: the facts agreed to by the parties; Mr. Wilson's evidence; the documentary evidence, and my review of the emails and attachments thereto, I find the facts to be as follows.

6. Bruce Power is Ontario's largest independent nuclear operator. It is subject to a number of collective agreements with both non-construction and construction trade unions, including the applicant. Bruce Power currently employs approximately 500 construction employees in a variety of trades. Ninety of the 500 construction employees have email accounts on the Bruce Power network because they are either supervisory employees or union stewards.

7. The use of Bruce Power's email system is governed by Bruce Power's Code of Conduct (the "Code of Conduct"). The current version of the Code of Conduct (which has been in effect since 2006) provides, in part, as follows:

> *Email*, the Internet and user file shares (all shared and personal drives) are *provided to employees for business use. While this policy is not intended to be unduly restrictive*, employees should be aware that the Company has the ability to monitor email, Internet and file share usage. Inappropriate use, particularly usage that interferes with business processes or puts a strain on business resources, is unacceptable. *Examples of inappropriate use of these resources would be*: chain letters, computer games, storing or *distributing non-business-related files (i.e., documents, pictures and music*) downloading of software, accessing Internet chat groups that are not business-related, accessing websites that involve gambling, personal share trading, computer games or pornography, or the conducting of any business activates not related to Bruce Power.
>
> *The Company expects that staff will not use email*, the Internet or file shares *to display*, generate *or pass on to others material (whether in text, pictures or any other form) which may be regarded as offensive on the basis of race, sex, disability or any other grounds. Whether or not you intend to cause offence and whether or not you yourself find the material offensive is irrelevant.* You should not distribute or pass on any material that is actually or potentially defamatory of any person, firm, or company, whether or not connected with the Company. Jokes at the expense of named or identifiable others are included within this prohibition. Email or files may be deleted from one's account when it is deemed appropriate to do so.
>
> ...

> Bruce Power is committed to a workplace where employees are treated with dignity, fairness and respect. All employees have the right to work in an environment that is free of discriminatory practices and harassment and that provides equal employment opportunities.
>
> Discrimination and harassment can take many forms, such as abuse of authority, bullying, mobbing, sexual harassment, sexual solicitation and systemic discrimination, to name a few.
>
> [emphasis added]

8. The cover letter that accompanies the Code of Conduct informs employees that, if they are in doubt as to what is expected of them in any particular situation, they are to ask their manager or supervisor for advice, consult Bruce Power policies and procedures, call the Code of Conduct Help Line or contact Human Resources. The Code of Conduct itself states that a "…failure to comply with the Code of Conduct may render you liable to disciplinary action that could result in termination of your employment or contract with or without notice."

9. The Code of Conduct in effect prior to 2006 was similar to the current Code of Conduct in all material respects.

10. The Code of Conduct is reviewed with employees regularly. In 2004 and 2005 there was a Code of Conduct Rollout Presentation. The materials used at that presentation contain the following reference to email use:

- Email & internet policy
  - Limited personal use acceptable
  - Note inappropriate uses (e.g. games, porn, offensive material, download software…)

11. Starting in or about 2006, the yearly "roll out" for the Code of Conduct was conducted by way of an on-line course. At the conclusion of the course, the employee is required to take an on-line quiz with 25 multiple choice questions. An employee must score 80% or better to pass the course. There is no dispute that each of the grievors completed the on-line Code of Conduct course in 2006, 2007 and 2008 and would have previously attended the yearly Code of Conduct Rollout Presentations.

12. In addition to the annual reviews of the Code of Conduct, there are periodic e-mails that are sent to all staff regarding the Code of Conduct and the proper use of Bruce Power's email system. By way of example, a global email was sent on November 27, 2007 with the following message:

> Code of Conduct – Reminder (November 27, 2007)
>
> …
>
> *The following is a guide to types of behaviour that are considered unprofessional and unacceptable. (This list is not exhaustive)*
>
> - Threats of violence
> - Unwanted physical contact
> - *Offensive, suggestive or lewd* comments, gossip, slander, *emails* and letters

- Insensitive/obscene jokes, signs, posters, graffiti, obscene gestures
- Isolation or exclusion from social activities/meetings/ conversations
- Intrusion by pestering spying and stalking
- Coercion for sexual favours
- Bullying public criticism or abuse of authority.

Any individual who is found to have violated the Code of Conduct may be subject to disciplinary action, up to and including termination.

Supervisors: if you have staff members that do not have access to Global Emails, please ensure this is printed and reviewed with them.

[emphasis added]

13. In or about December 2007, following an employee complaint, Bruce Power hired Deloitte & Touche to conduct an investigation into the inappropriate use of Bruce Power's email system. The investigation was conducted on all Bruce Power email users, including management. Approximately 5000 email accounts were reviewed. The period of time covered by the audit was January 2007 to February 2008.

14. As a result of the investigation, it was determined that 67 employees had sent inappropriate emails in violation of the Code of Conduct. Sixty-one of the 67 employees (including the grievors) were members of the Building Trades Unions. Six of the employees were represented by the Power Workers' Union ("PWU"). The final number of employees disciplined was less than 67 as, during the period of the investigation, some of the employees left the employ of Bruce Power.

15. All of the emails determined to be inappropriate were then reviewed by individuals from the Bruce Power Human Resources and Information Technology departments. The emails were categorized as an "A" or a "B". Category A included emails that were considered to be more explicit and included any email that showed genitalia. All of the remaining emails were placed in Category B.

16. Most of the emails contained attachments. The attachments included photographs, slide shows, videos and cartoons. Many of the attachments included an audio component. Each and every one of the emails can be classified as being one or more of the following: racist; misogynist; sexist; homophobic; containing sexual content; degrading to women; or vulgar. Many of the emails were distributed during working hours.

17. Bruce Power interviewed each of the employees found to have sent inappropriate emails prior to the imposition of any discipline. The applicant's Business Manager, Allan McQuillan, was present at each of the meetings that Bruce Power held with the grievors. At the meetings, the grievors were presented with the results of the investigation. Notes of the meetings were taken and later transcribed. The notes were then used to create a document entitled "Manager's Record of Facts" which records all of the relevant details.

18. It was then necessary to put the information into a format that could be used by management to determine the quantum of discipline, if any, to be imposed on each of the individuals. A chart was created listing the 60 individuals (the other seven had since left Bruce Power) along with: their union affiliation; the number of email exports; the existence of mitigating factors (remorse, years

of service and intent); and points for consideration. The final column of the chart contained the recommended outcome. The recommended outcome was based on the following chart:

# of Exports	Category A (nudity/pornography)	Category B Only (offensive)
20 or greater	12 day suspension	N/A
10 - 19	6 day suspension	4 day suspension
5 - 9	3 day suspension	1 day suspension
Less than 5	Written reprimand	JPC [job counselling]

19. When setting the recommended outcomes, the following factors were taken into account:

- The number of email exports (e-mails forwarded on-site and off-site)
- The nature of the material (Category A or B)
- The individual's role in the organization (e.g. supervisor, position of trust, employee representative)
- Intent as confirmed in the interview
- Whether the individual showed remorse
- Prior disciplinary record (in all cases the employees had clean records)
- Seriousness of the offence in terms of Company Policy and Company obligations
- The outcomes of a similar investigation conducted in 2004.

20. The last item listed above is a reference to the fact that Bruce Power conducted a similar audit of email accounts in 2004, as a result of which discipline was imposed on a number of PWU and Society members, including eight who were terminated. Amongst the PWU members disciplined were members of the Building Trades Unions who were working under an Appendix of the PWU agreement. A number of grievances were filed. These grievances were eventually settled at mediation. The discipline that was imposed as an outcome of the mediation included: two verbal warnings; three one-day suspensions; two three-day suspensions; six five-day suspensions; four 10-day suspensions; one 15-day suspension; and eight discharges revised to resignations with bans from the site ranging from one year to lifetime bans. Bruce Power determined that it did not want to terminate any of the employees involved in the 2008 investigation. Individuals who, pursuant to the results of the 2004 mediation, would have had their employment cease, were instead given 12-day suspensions.

21. Each employee's circumstances were considered on an individual basis. The outcome for any particular individual was obtained by first determining if they had sent any emails that were in Category A. If they had, all of their emails (including those falling in Category B) were treated as being in Category A. The discipline listed under the heading "Category A" associated with the total number of emails sent was recommended. Only if all of the emails sent by the individual fell within Category B was the discipline listed under the Category B heading recommended. The rationale offered was that, if an individual sent even one Category A email, they had demonstrated a propensity

to send more offensive material and the disciplinary response warranted was higher. The disciplinary penalties imposed ranged from job counselling to a 12- day suspension.

22. As indicated above, the only construction employees with access to email are either union stewards or supervisory employees. There are 90 Bruce Power construction employees with access to email, 61 of whom were found to have sent inappropriate emails. The only other employees found to have distributed inappropriate emails were six PWU members. None of the remaining approximately 4,900 employees with email accounts were found to have distributed inappropriate emails.

23. A number of employees of Crossby Dewar, a contractor to Bruce Power, were found to have distributed inappropriate emails by way of Bruce Power's computer system. They were each given a written reprimand by Crossby Dewar. There is no way of telling if this discipline is in line with that meted out by Bruce Power as no details as to the number or nature of the emails distributed by the employees of Crossby Dewar were provided.

24. The union stewards each have access to their own computer in a chief stewards' trailer. The trailer is arranged so that there are four desks with computers in each room. The supervisory construction employees have access to their own computer in either a trailer or an office area depending upon whether they are at Bruce A or Bruce B. Some of the computers are in an open area while others are in a cubicle.

25. With the exception of nine grievances by the Sheet Metal Workers (seven of which are the subject of this decision), one grievance filed by the Labourers International Union of North America, Local 1059 ("Local 1059") and three grievances filed by the International Union of Painters and Allied Trades ("IUPAT"), none of the other discipline imposed was the subject of a grievance. Local 1059 and the IUPAT did not refer their respective grievances to arbitration and are now out of time to do so.

26. The particulars concerning each of the seven grievors, as relied upon by Bruce Power in support of the discipline imposed, are as follows:

John Barltrop – Six-Day Suspension Imposed

27. Mr. Barltrop had been employed with Bruce Power for approximately 23 years and occupied the position of Chief Steward at all material times.

28. When confronted about the situation during the disciplinary interview, Mr. Barltrop indicated that he understood that his behaviour was unacceptable in the workplace. Mr. Barltrop was aware of, and had been given training on, the Code of Conduct on multiple occasions. Mr. Barltrop indicated that he sent the emails to people who were familiar to him and who he thought would enjoy the humour. He indicated that he did not send any of the emails off-site (although three emails were in fact sent off-site). He also did not realize the seriousness of the situation and apologized for his conduct. He indicated that he deleted everything that he had and would ask others not to send him these kinds of emails in the future. Out of the 12 emails that Mr. Barltrop distributed, Bruce Power categorized two of them as Category A and 10 as Category B.

Ric Bates – One-Day Suspension Imposed

29. Mr. Bates had been employed with Bruce Power for approximately 20 years at the time of the events giving rise to the grievance. Mr. Bates is a supervisory employee.

30. When confronted about the situation during the disciplinary interview, Mr. Bates indicated that he understood that his behaviour was unacceptable in the workplace. Mr. Bates was aware of, and had been given training on, the Code of Conduct on multiple occasions. Mr. Bates indicated that he sent the emails to people because it was his "routine" and that he was asked to forward some of them. He indicated that he knew he was wrong and would not do it again. Out of the eight emails that Mr. Bates distributed, Bruce Power determined that all of them were classified as Category B.

John Cameron – Six-Day Suspension Imposed

31. Mr. Cameron had been employed with Bruce Power for approximately seven years at the time of the events. Mr. Cameron held a supervisory position.

32. When confronted about the situation during the disciplinary interview, Mr. Cameron indicated that he understood that his behaviour was unacceptable in the workplace. Mr. Cameron was aware of, and had been given training on, the Code of Conduct on multiple occasions. Mr. Cameron indicated that he sent the emails because he didn't take into account the possible consequences of his actions at the time. He apologized and stated that he would not do it again. Out of the 15 emails that Mr. Cameron distributed, Bruce Power determined that five of them were Category A.

Wayne Hackett – Three-Day Suspension Imposed

33. At the time of the events giving rise to the grievance, Mr. Hackett had been employed with Bruce Power for approximately 23 years. Mr. Hackett held a supervisory position.

34. Mr. Hackett indicated he understood that his behaviour was unacceptable in the workplace. Mr. Hackett was aware of, and had been given training on, the Code of Conduct on multiple occasions. Mr. Hackett indicated that he sent the emails because he felt his peers would find the material amusing. He indicated that it wasn't his intention to be offensive or malicious. He apologized and stated that he would not do it again. Out of the six emails that Mr. Hackett distributed, Bruce Power determined that one of them of them could be classified as Category A.

Brian Jones – Three-Day Suspension Imposed

35. Mr. Jones had been employed with Bruce Power for 10 years. Mr. Jones held a supervisory position.

36. When confronted about the situation during the disciplinary interview, Mr. Jones indicated that he understood that his behaviour was unacceptable in the workplace. Mr. Jones was aware of, and had been given training on, the Code of Conduct on multiple occasions. Mr. Jones indicated that he sent the emails because he felt his peers would find the material amusing. He indicated that it wasn't his intention to be offensive. He stated that it was a lack of good judgment on his part. Out of the eight emails that Mr. Jones distributed, Bruce Power classified one of them as Category A.

John Rumford – Twelve-Day Suspension Imposed

37. At the time of the events, Mr. Rumford had been employed with Bruce Power for 18 years. He held a supervisory position.

38. When confronted about the situation during the disciplinary interview, Mr. Rumford indicated that he understood that his behaviour was unacceptable in the workplace. Mr. Rumford was aware of, and had been given training on, the Code of Conduct on multiple occasions. Rumford indicated that he sent the emails because he felt his peers would find the material humorous. He indicated that it wasn't his intention to be offensive. Out of the 21 emails that Mr. Rumford distributed, Bruce Power classified seven of them as Category A.

John Watson – Six-Day Suspension Imposed

39. Mr. Watson had been employed with Bruce Power for approximately nine years at the time of the events giving rise to the grievance. Mr. Watson held a supervisory position.

40. When confronted about the situation during the disciplinary interview, Mr. Watson indicated that he understood that his behaviour was unacceptable in the workplace. Mr. Watson was aware of, and had been given training on, the Code of Conduct on multiple occasions. Mr. Watson indicated that he sent the emails because he saw humour in the material and didn't realize what the potential consequences would be. He apologized for his conduct, agreed to remove the offensive material from his computer and promised never to do it again. Out of the 19 emails that Mr. Watson distributed, Bruce Power classified six of them as Category A.

41. As indicated above, it is acknowledged by the Union and each of the grievors that the distribution of the emails in question was inappropriate and constitutes cause for discipline. The sole challenge is to the quantum of discipline imposed. The Union asks that I exercise my discretion as provided for in section 48(7) of the Act to substitute a warning for the suspension imposed on each of the grievors.

42. The Union advances the following arguments in support of its position.

43. First, the Union argues that the employees are entitled to a "warning shot" and thus ought to have been given an oral or written warning.

44. Second, the Union argues that the purpose of discipline is to bring the misconduct to an end. According to the Union, the sole factor to be considered when determining the amount of discipline to be imposed is how much discipline is required in order to stop the misconduct. The Union disputes that the number or nature of the emails distributed is a relevant consideration when determining the appropriate level of discipline to be imposed. Having regard to the fact that other employees (with fewer email distributions) and the employees of Crossby Dewar were given a written warning, the Union argues that Bruce Power must have considered a written warning to be sufficient to stop the misconduct. The Union asks whether the difference between sending one offensive email and sending 21 offensive emails justifies a difference in penalty of 12 days. According to the Union, the chart used by Bruce Power is not designed to correct behaviour; rather, the chart produces disproportionate results. While the Union advanced an argument that the absence of any further inappropriate emails since the conclusion of the investigation supports the conclusion that a written

warning would have sufficed, I have not considered this argument as there is no evidence before me as to what emails were or were not sent after the conclusion of the investigation.

45. Thirdly, the Union argued that the fact that 61 out of 90 construction employees with access to email were found to have distributed inappropriate emails, means that the misconduct was widespread. In the Union's submission, the widespread nature of the misconduct raises a question as to whether there was a permissive culture in existence and whether the conduct gave rise to a poisoned work environment or could give rise to a poisoned work environment.

46. Next, the Union argues that the emails constituted jokes that were only sent to people the sender knew would not be offended. The Union asserts that the language of the Code of Conduct states that it is not intended to be overly restrictive and clearly permits the sending of some jokes. The material that the Code of Conduct does not permit is material that "may be regarded as offensive". I understand the Union to be suggesting that the grievors may have misunderstood the language of the Code of Conduct and thought that, provided the recipient of the email did not find it offensive, its distribution was not prohibited by the Code of Conduct. Again, there is no evidence before me as to what the grievors thought when they were sending the emails or whether they considered the language of the Code of Conduct when doing so.

47. Finally, the Union argues that the chart used by Bruce Power to determine the amount of discipline to be applied produces arbitrary results. Where an individual has sent a number of emails, but only one of them is categorized as an A, all emails sent by that individual are treated as falling within category A. The Union disputes that this system provides a rational basis for discipline.

48. For the reasons that follow, I am not persuaded that I should substitute lesser discipline for the suspensions imposed by Bruce Power on the seven grievors.

49. There is no doubt that, in today's society, an employer has an interest, if not an obligation, to maintain a workplace where there is a respectful and professional decorum. The presence of a respectful and professional work environment decreases employee turnover, raises employee morale and enables an employer to attract and retain new employees. Offensive emails distributed under email addresses bearing the employer's name can reflect poorly on the employer. Such emails can result in harm to the employer's reputation and embarrassment for the employer. Further, the receipt and distribution of racist, misogynist, sexist, homophobic and material that is degrading to women has human rights implications and contributes to a culture that is inconsistent with the objectives of the *Ontario Human Rights Code*. An employer has an obligation to prevent a poisoned work environment and maintain one free from harassment.

50. The emails distributed by the grievors contained material that was, in varying degrees racist; misogynist; sexist; homophobic; degrading to women; vulgar or contained sexual content. Some of the emails contained warnings demonstrating that the sender knew the email was inappropriate. The following warnings accompanied some of the emails: "open with care"; "viewer beware"; "not in front of the children"; "you might want to delete this one it is pretty graphic". In many cases, the material attached to the emails, either a slide show or video, takes a number of minutes to view. In addition, in many cases, the material is accompanied by audio that is extremely vulgar and/or offensive. By way of example only, one of the emails bore the subject line "The Big Man not in front of the children." The sender added a note indicating that, in his opinion, the message conveyed in the attached video applied equally in Canada. The attached video was 1:42

minutes in length. The video consists of a man, hiding his face behind the brim of his hat, espousing the view, in a hostile and belligerent tone of voice, with the constant use of obscenities, that F… immigrants to America who do not speak F… English are lowering the F….standards and should get the F… out. At one point in the video he states "F… them where they F… breathe." This video is not only racist; it adopts a threatening tone and encourages violence towards immigrants to our country who do not speak English.

51. The Union suggests that the fact that the distribution of offensive emails was widespread and that offensive emails were only sent to those the sender thought would appreciate the humour means that no harm was done. Essentially, the union argues that all those in this work environment were of a similar mind and not offended by the material distributed. I reject this argument for a number of reasons. First, there is no evidence that others in the workplace did not find the material offensive. Recall that the audit was in fact brought about as a result of an employee complaint. Second, employees ought not to be put in the position of having to object in order to avoid having offensive material sent to them. Further, even if no present employee found the material offensive, the grievors were engaged in a process of creating a culture and workplace environment that was hostile to women, racial minorities and homosexuals. The fact that no one voiced the opinion that the material in question was offensive does not mean that the grievors had the right or entitlement to create such a workplace culture. Regardless of whether the group targeted by the offensive material is presently represented in the workplace, such material does not belong in a place of work. A workplace is to be open and available to people of all races, sexual orientations and sexes. I fully adopt the following comments made by Arbitrator Petryshen in *Ontario Public Service Employees Union (Wickett et al) and The Crown in Right of Ontario (Ministry of Natural Resources)* in the matter of an arbitration under the *Crown Employees Collective Bargaining Act* before The Grievance Settlement Board (August 12th, 2005) at paragraph 28:

> The Union submits that in characterizing the conduct of the grievors it is important to consider that no employee complained to management about receiving the offensive material, that there is no evidence to establish that the distribution of the inappropriate material in the workplace created a poisoned work environment, that the grievors did not intend to create a poisoned work environment and that they did not intend to harass other employees. I concluded in the best-case decision [*Re The Crown in Right of Ontario (Ministry of Natural Resources) and Ontario Public Service Employees Union*, (2003) 115 L.A.C. (4th) 120] that the receipt and distribution of material by e-mail in the workplace which objectifies, denigrates and depicts acts of violence against women and which is objectionable in other respects from a human rights perspective, poisons the workplace and therefore contravenes the WDHP Policy. It is my view that the presence of this type of inappropriate material in the workplace creates an unwelcome, oppressive and hostile environment for women and others, and it serves to lower the status of women and others as valuable contributors. It sets the norms for who is included and who is excluded in the workplace. It is because of these effects that the circulation of offensive material by e-mail between employees by itself creates a poisoned work environment, one which the HRC [*Ontario Human Rights Code*] and the WDHP Policy attempts to prevent. In my view, a complaint from an employee about receiving offensive material or evidence to link the presence of offensive material at work to the harassment of one employee against another employee are not necessary to prove the existence of a poisoned work environment. Whether in the context of the WDHP Policy or otherwise, the absence of a complaint does not alter the nature of the activity engaged in by the grievors and the other employees who were disciplined. As counsel for the employer submitted, the absence of an employee complaint in

> these circumstances is evidence only of the fact that no employee complained. The existence of a poisoned work environment created by the presence of offensive material in the workplace could directly result in negative consequences such as the harassment of an employee by another employee. However the absence of any evidence of such negative consequences does not mean in this context that a poisoned environment has not been created. Whether the grievors or other employee intended to poison the workplace by receiving or sending offensive material does not alter the fact that this is precisely what they did.

52. The Union suggests that the grievors were entitled to a "warning shot" and thus ought to have received an oral or written warning. I take the Union to suggest that a warning is appropriate in order to bring to the employees' attention that the conduct is not acceptable and is further consistent with the concept of progressive discipline.

53. I do not agree that the grievors were entitled to a warning shot. First, the grievors were all aware that the distribution of offensive emails was inappropriate. The grievors had all taken training on the Bruce Power Code of Conduct yearly for the past several years. One of the messages in the Code of Conduct is that staff are not to use email to pass material which may be regarded as offensive on the basis of race, sex, disability or any other grounds. The Code of Conduct clearly states that the test is not whether you yourself find the material offensive or intend to cause offense. The Code of Conduct Training materials and global email messages state that the sending of offensive material is not acceptable.

54. Further, it is noteworthy that the audit of email accounts included 5000 accounts. Out of those 5000 accounts only 67 were found to contain evidence of the distribution of inappropriate emails. That is a fairly small percentage and suggests that, in every other area of the Bruce Power organization, employees understood that the sending of offensive emails was not permitted and refrained from doing so. The fact that the 67 employees who were found to have sent offensive emails are all amongst a group of 90 construction employees who have email access does not, when the total number of employees audited is considered, establish the existence of a permissive environment. Rather, it indicates that this particular group of employees, for whatever reason, did not take the employer's message, as set out in the Code of Conduct and reviewed with the employees yearly, seriously.

55. In addition, even in the absence of the Code of Conduct or annual training touching upon the issue, any reasonable employee would understand that the sending of offensive email by way of the employer's email system was unacceptable. This view has been expressed in a number of arbitral awards including: *Consumers Gas v. Communications, Energy and Paperworkers Union* (Primiani Grievance), [1999] O.L.A.A. No 649; *Re Telus Mobility and Telecommunications Workers Union*, (2001), 102 L.A.C. (4th) 239 (November 30, 2001); *Re Treasury Board (Solicitor General Canada Correction Service) and Briar et al*, (2003), 116 L.A.C. (4th) 418 (January 20, 2003); and *Re The Crown in Right of Ontario (Ministry of Natural Resources) and Ontario Public Service Employees Union*, (2003) 115 L.A.C. (4th) 120) (January 23, 2003). The fact that only 67 of 5000 Bruce Power employees were found to have distributed offensive emails supports this conclusion.

56. The application of the concept of progressive discipline is but one factor that the employer was required to consider when determining the amount of discipline to impose. In considering the fact that each of the grievors had clean disciplinary records and what the penalty ought to be for a first offence of this type the employer did consider the application of progressive discipline. Equally,

however, the employer was entitled to consider factors such as the seriousness of the offence, including the offensiveness of the material and the number of distributions by each grievor. As indicated in *Re The Crown in Right of Ontario, supra,* at page 151, a reasonable employee would understand that the more offensive the material, the more serious the offence and consequences. There are a number of arbitral awards where the discipline imposed for a first offence of distributing offensive material was a substantial suspension (see the cases summarized in *Re The Crown in Right of Ontario, supra,* commencing at page 140).

57. I am equally not persuaded by the Union's argument that the sole factor to consider is what quantum of discipline is required in order to ensure that the conduct will not be repeated. The arbitral jurisprudence is well established on this point. There are a multitude of factors that are to be considered when determining the amount of discipline to be imposed. As discussed above, the concept of progressive discipline is one such factor. In the case of the distribution of offensive materials by email, the cases establish that additional factors to be considered include the nature of the material and the frequency of its distribution. The more offensive the material and the more frequent the distributions, the higher the penalty warranted (see: *Dupont Canada Inc. v. Communication, Energy and Paperworkers Union of Canada, Local 28-0* (Panter Grievance), [2001] O.L.A.A. No 676 (August 30, 2001) at para. 47; *Re Telus Mobility, supra,* at page 260; *Krain v. Toronto-Dominion Bank,* [2002] C.L.A.D. No. 406 (September 23, 2002) at para. 22; *Re The Crown in Right of Ontario, supra,* at page 149; and *Ontario Public Service Employees Union (Wickett et al), supra,* at pages 17 and 21.)

58. Finally, I am not persuaded that the chart utilized by Bruce Power to determine the disciplinary penalty to be imposed on the grievors produced arbitrary results. Recall, Bruce Power categorized the emails as a Category A if they contained pictures of genitalia and as a Category B if they were offensive but did not contain pictures of genitalia. Then, if an individual distributed one Category A email, they got the discipline listed in the Category A column associated with the total number of emails they sent. Only if all of the emails sent by the employee were Categorized as a B did the employee get the lesser discipline listed in the Category B column. Bruce Power's rationale for this system was that, if an employee had sent a Category A email, they had demonstrated a propensity to send more offensive material and thus merited a higher penalty. By way of example, the application of the categorization system and the chart had the following results:

Name	Total Emails Distributed	Category A	Category B	Discipline Imposed
Wayne Hackett	6	1	5	3 days
Brian Jones	8	1	7	3 days
Ric Bates	8	0	8	1 day

59. As indicated above, many arbitral awards have held that nature and frequency of the offensive emails is a relevant consideration when determining the quantum of discipline to apply. All of the grievors had clean disciplinary records, long years of service and acknowledged what they had done was wrong. Essentially, the only differentiating factors between the grievors were the offensiveness and number of emails sent. Bruce Power devised a system for categorizing the emails and for attaching increasing penalties to those who sent more offensive emails or a greater number of

emails. Recall that when Bruce Power was going through this process, it had to determine the discipline to be applied to 60 employees. As the above chart demonstrates, as a result of the system created by Bruce Power, the offensiveness of the email carried more weight than the number of emails sent. Mr. Hackett who sent only six emails received a three-day suspension, whereas Mr. Bates who sent 8 emails received a 1-day suspension. Mr. Hackett's longer suspension was a result of the fact that he was considered to have sent an email that was more offensive than any of the emails sent by Mr. Bates.

60. The issue then is whether I should exercise the discretion conferred upon me by section 48(17) of the Act to substitute a lesser penalty than that imposed by Bruce Power on the seven grievors. In my view, the following quote from *Re Volvo Canada Ltd. and C.A.W., Loc. 720* (1990), 12 L.A.C. (4th) 129 is apposite:

> 19. The issue which remains to be determined is whether I should exercise the authority conferred on me by s. 43(1)(d) of the *Trade Union Act*, R.S.N.S. 1989, c. 475, and art. 6.15 of the collective agreement to substitute a lesser penalty for the five-day suspension. In addressing this issue, I propose to adopt the same approach that I took in *Re Volvo Canada Ltd. and U.A.W., Loc. 720*. (1984), 16 L.A.C. (3d) 153, where I held that the power of penalty substitution should be exercised with due restraint. I can do no better than repeat what I said at that time on the subject, at p. 159 of the report:
>
> > It is well settled, of course, that arbitrators should use the power of substitution with some caution. As I said in the fairly recent case of *Amalgamated Transit Union, Local 508 v. Metropolitan Transit Com'n of Halifax, Dartmouth and Municipality of County of Halifax* (June 20, 1983), unreported, at p. 15:
> >
> > > "The point is that the imposition of disciplinary sanctions is an inexact science. Provided that the penalty imposed by the employer does not offend the arbitrators' sense of justice and equity, it should not be tampered with merely for tampering's sake."
> >
> > Putting the matter in a somewhat different way, the question that arbitrators should ask themselves when considering penalty substitution, is whether the penalty imposed by the employer is within the range of reason having regard to all the circumstances of the case. Arbitrators should not interfere with a penalty merely because, had they been the employer, they would have handled the matter somewhat differently.

61. While one might be tempted to tinker with the manner in which Bruce Power categorized the emails, the system they used was within the range of reasonable. They adopted a system that could be applied objectively and did not require any one individual to make a subjective judgement as to levels of offensiveness. In my view, many emails that ought to have been categorized as being more offensive, and thus falling within Category A, escaped such categorization as a result of the system used. If anything, the categorization system adopted worked to the grievors' advantage. Bruce Power then devised a system of penalties that escalated based on the offensiveness of the emails and their frequency. Offensiveness was given greater weight than frequency. Again, while one might quibble with the outcomes individually or when compared to those given to others for one reason or another, all of the outcomes were within the range of reasonableness.

62. For the foregoing reasons, it is my determination that the penalties imposed on the seven grievors by Bruce Power are within the range of reason, considering all of the circumstances of this case, and I decline to interfere with the penalties imposed.

63. This grievance is dismissed.

3281-08-U Robert Gullins, David Hussey, Michael Lloyd, and Perry Speranza, Applicants v. **Centennial Electric Ltd.**, Discovery Electric Ontario Limited, Fortis Electric Ltd., Galmar Electrical Contracting, Guild Electric Limited, Jay Electric Limited, Nortown Electrical Contractors, Ozz Electric Inc., Panson Electrical Services Ltd., Plan Electric Company, Platinum Electrical Contractors Inc., Proto Electric Contracting Inc., Richview Electric Inc., Riviera Electrical Contractor Inc., Rogol Electric Company Limited, Speedy Electric Contractors Ltd., Symtech Canada Ltd., Tam Electric Ltd.. Urban Electrical Contractors, Zerem Electrical Services Ltd., Responding Parties v. International Brotherhood of Electrical Workers (I.B.E.W.), District 1 – Canada, Intervenor v. International Brotherhood of Electrical Workers, Local 353, Intervenor

Construction Industry – Delay – Standing – Unfair Labour Practice – Four members of the IBEW local brought an application against nineteen electrical contractors alleging they interfered in an election of officers to the Local by assisting the incumbent slate in their election efforts – The responding parties brought a motion to dismiss on a number of grounds – The Board found the members had no standing to bring a complaint under s. 72 or 76 as these sections prohibit conduct towards individual employees and the members were not employees nor were they authorized to represent any employees – The Board found however that they did have standing to bring an application alleging a breach of s. 70 since the allegation was arguably an interference in the administration of a trade union, however the Board went on to exercise its discretion not to inquire into the matter for four reasons: first, there was no basis for making a cease and desist order as requested; second, the "rule making and sanctioning role" was not in keeping with the general thrust of the Act; third, the delay was significant in that the complaint was brought well after the time the Board, or the employer, could do anything; finally, while the conduct complained of may breach s. 70, this is also not so plain and obvious – Complaint dismissed

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *James Robbins, Robert Gullins, David Hussey* and *Perry Speranza* for the applicants; *Scott G. Thompson* and *Ellen Silver* for the responding parties; *Harold F. Caley* for IBEW District 1; *A.M. Minsky* and *Robert White* for IBEW, Local 353.

DECISION OF THE BOARD: June 9, 2009

1. This is an unfair labour practice complaint brought by four individuals who are members of the International Brotherhood of Electrical Workers Local 353 ("IBEW Local 353"). The employer responding parties are nineteen electrical contractors, all of whom are bound to the IBEW-CCO Provincial Collective Agreement covering work in the ICI and in some cases, other sectors of

the construction industry. At the hearing, the applicants withdrew as against Fortis Electric Ltd., the twentieth responding party. The four applicants sought elected office in an election of local officers of IBEW Local 353 in 2008. They ran against the incumbent officers' "slate" of candidates and lost by a fairly small margin. They allege in this complaint that nineteen of the responding party employers took steps to assist the incumbent slate in their election efforts that, in the applicants' view, constitute a violation of sections 70, 72 and 76.

2. At the opening of the hearing, the responding parties made a motion to dismiss the application in its entirety, or in part, on certain grounds set out in detail below. I conclude that the application should not be dismissed on most of those grounds, but that the Board should exercise its discretion not to inquire into this application for the reasons contained in this decision.

3. In the application as originally filed, the applicants sought various sorts of relief, including the ordering of a new local election to be supervised by the OLRB. On the day set for hearing, they revised and narrowed the relief sought to a declaration of a violation, a posting of notices on jobsites advising employees of that declaration, and a cease and desist order with respect to that sort of activity in future elections. The applicants' reasons for narrowing the relief sought were that the elections had been held one year before the hearing date and that the term was only for three years so that a new election granted after several days of hearing would leave too short a time in the current mandate to be meaningful or worthwhile.

4. The applicants state that the issue for determination in this complaint is their assertion that candidates in a local union election are entitled to a "level playing field" and that these employers had interfered in the formation, selection or administration of a trade union contrary to section 70. In addition, the four applicants allege that certain of the actions constitute a threat or other attempts to compel employees to vote in one particular way, contrary to section 72, and that some of these threats constituted intimidation and coercion contrary to section 76.

5. The IBEW and IBEW Local 353 intervened in this matter, as the complaint originally sought relief against Local 353 and challenged an election appeal process under the IBEW Constitution, which was decided by the IBEW. They remained parties during the argument of the preliminary motion.

6. The responding parties bring a motion to dismiss the application, or alternatively to request the Board to decline to enter into an inquiry about the application, on a number of grounds. These are as follows:

(a) The applicants lack the standing to bring a complaint under sections 70, 72 and 76;

(b) The applicants seek to have the Board regulate the internal affairs of IBEW Local 353 which it has no jurisdiction to do, and in any event, the decision to proceed with an appeal under the IBEW Constitution forecloses any application to this Board;

(c) The complaint should be dismissed for delay;

(d) The facts as alleged do not make out a case for the relief sought and should be dismissed pursuant to Rule 39.1;

(e) In addition, the responding parties each ask, individually, that if the Board feels there is a basis for inquiring into some of the particulars being alleged with respect to some of the employers, then the complaint ought to be dismissed against the other employers and each of the remaining employers will defend itself on an individual basis;

(f) The Board should exercise its discretion not to inquire into the complaint.

I shall deal with these in order, combining them where appropriate.

Standing

7. Sections 72 and 76 are both sections that prohibit certain conduct towards individual employees. Complaints that an employee has been treated in a manner contrary to those sections must be brought by the employee or by an entity with authority to represent that employee, typically a trade union. One employee (or in this case, a non-employee who is a member of the same trade union) cannot bring a complaint that alleges improper behaviour towards another employee or other persons without that person's authorization (see *Sean McKenny* 2002 CanLII 26875 (ONLRB), (April 3, 2002), [2002] OLRD No. 1042 (QL) and cases cited therein at paragraph 3).

8. In this case, even assuming that there are facts that might establish a violation of sections 72 and 76, the actions referred to were in respect of employees who are not the applicants. Indeed they are not and were not employees of the responding parties at any time during the election campaign. The four applicants do not assert any authority to represent those individuals, on an institutional or a personal basis. The applicants therefore have no standing to bring a complaint with respect to any alleged violation of the Act in respect of those other individuals, and the allegations of a violation of sections 72 and 76 are dismissed for that reason.

9. I am not prepared to find that there is no standing to bring a complaint of a violation of section 70. That section provides:

> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

The allegation in this case is that certain employers did things to assist the election of one group of candidates over another. That is at least arguably an interference in the administration of a trade union. In that case, if such behaviour succeeds, it is unlikely that the Union itself (under the control of the newly-elected executive whose members were allegedly favoured by the Employer) would ever complain of the breach. Only the losing candidates would have any interest in doing so. Assuming

that such allegations could be proved, the unsuccessful candidates are the only ones who suffered any loss arising from such alleged violation; indeed, they were the intended target and victim of such action. Accordingly, I find that the applicants have standing to bring a complaint alleging a violation of section 70.

The Regulation of Internal Union Affairs

10. This argument had more weight with respect to the relief as originally claimed. However, since the applicants have ceased to request the Board to order and/or supervise a new local election, it is not seeking to involve the Board in the internal affairs of IBEW Local 353. As ultimately framed, the complaint focuses on the action of certain employers during the Local Union election and seeks to have the Board put limits on what those employers can do. The focus of many unfair labour practice complaints are on employer action in regard to lawful union activity, typically certification, that has nothing to do with the internal workings of a trade union. In this case, both the facts and the remedies focus on employer actions and therefore do not constitute a request that the Board regulate internal union activity.

11. Similarly, the election review by the IBEW has no bearing on this case. The IBEW would have no ability to adjudicate anything with respect to employers of members of Local 353 in an internal union process, nor did it purport to do so.

Delay

12. The first election vote was held on June 19, 2008, with runoffs for certain positions on July 10, 2008. The employer actions complained of are alleged to have occurred in June and July 2008. This complaint was delivered to the responding parties on February 9, 2009. Thus, the time between the election and the filing of the complaints is seven months. The applicants state in the application that they did not acquire some of the information until January of 2009, but were aware of most of it shortly after it occurred.

13. The reasons offered by the applicants are not particularly compelling. Gathering the funds to proceed was one problem, but more specifically, they were waiting to gather a sufficient number of incidents to attempt to demonstrate a pattern of behaviour.

14. The responding parties have all filed individual replies. None of these replies indicate any difficulty with regard to the details of the allegations. The only significant timeliness issues are raised by several of the responding parties, saying simply that had the applicants raised the allegations of preferential treatment at the time it happened, the Employer could have offered a similar opportunity to the candidate who felt aggrieved. That opportunity disappeared with the elections.

15. Delay in these circumstances is not in and of itself a reason to dismiss the complaint. Seven to eight months is not a very lengthy period for what are, in reality, individual complaints and there is no significant prejudice to which any of the employers can point. However, the delay is a factor in the Board's overall exercise of its discretion, which is dealt with below.

No *prima facie* Case

16. Because of the view I take of how I should exercise the Board's discretion in this matter, I will say little about this issue. The test for dismissal is well known and articulated often by the Board. It is not enough to demonstrate that the allegations will likely fail based on the Employers' response to the facts or because they appear to assert an unlikely possibility. An application will be found to be one that cannot succeed only where there is no view of the facts that could make out a case for the relief sought. It must be clear that there is no valid issue to be determined.

17. I note as well that a conclusion that there is no possible chance of success in a case is one that is generally made in the context of reasonably well established case law. There is little case law directly on point with respect to the issues raised by this complaint. The very volume of case law referred to by the parties attests to the lack of clearly relevant decisions to consider. In such circumstances the Board should be very reluctant that no chance of success exists.

18. I have therefore attempted to analyse each and every allegation of fact in the complaint to determine whether or not a complaint has been made out. I do, however, make the following two observations.

19. First, despite the argument of counsel for the applicants, there is nothing in the facts as alleged that is capable of sustaining a finding that any of the actions complained of were part of a common pattern or agreed-upon course of action. Many things happened in a short space of time because the elections occurred on two specific dates. Obviously, any action related to an election will occur near but not after those dates. The fact that many Employers hold what was described in the application as their "annual" staff barbeques in June and July is hardly surprising. More significantly, even if one were to assume (as seems logical) that any of the actions complained of were at the request of one or more of the officers running for re-election, there is not even a bald allegation of a plan or conspiracy to coordinate these actions among the various Employers. Thus, the complaints are a series of individual complaints against individual contractors.

20. Second, the incidents complained of are, if they are a violation of the Act, at the less extreme end of the scale. Allegations that an employer urged employees to vote for one candidate as opposed to the other are probably the most serious allegations (although these are uniformly denied). Examples of the other sorts of complaints are allegations that an Employer chose to hold a barbeque and invite the current business manager, but not his electoral rivals; to include information for one candidate in a pay envelope (or simply distribute them in the same manner), but not those of the other candidate; to distribute the various candidates' leaflets at different times with the incumbent getting the first word in; and to fail to interrupt electioneering by one candidate during an unpaid lunch break (even if it does go beyond that time). These are all matters that, if they are a violation of the Act, are only arguably so. That is, the facts do not set out allegations which are strikingly obvious violations of the Act.

21. Beyond these two general observations, I make no further comment on whether the facts disclose a *prima facie* case.

Discretion

22. In deciding whether to exercise the Board's discretion to hear or to decline to hear this application, it is necessary to focus on what the applicants seek. In argument, counsel stated that the applicants no longer seek to undo the election in IBEW Local 353. Rather, in seeking declaratory relief, the applicants hope to establish certain guidelines for the future. They wish to establish the proposition that an election should, to the extent anyone has the ability to act, present a level playing field to all candidates. Further they wish to establish that employers are obliged to act or refrain from acting in a way that might alter that level playing field.

23. By focusing on the particulars with respect to each Employer, the applicants hope to determine what constitutes impermissible behaviour on the part of an employer during a local union election campaign. It is, in counsel's words, important to the applicants "to send a message to the employer community" and to set out the guidelines about what constitutes impermissible interference in union elections. In his submission, even if the applicants lose on the merits of each complaint, the fact that the Board is prepared to look at employer behaviour during an election campaign, in and of itself would have a "major impact" on the community.

24. These are laudable aims, but there are several problems with the argument. First, the Board does not offer guidelines in the abstract, or an advance ruling on a set of hypothetical facts. There must be a real issue for the Board to decide. Admittedly, there are real events and real people that are involved in each specific fact allegation in this complaint. However, what the applicants seek is essentially a forward-looking rule-making result from this decision. They do not seek any practical result.

25. A cease and desist order, as sought, would be a kind of practical result, but there is no basis for issuing such an order. There is no allegation that the identical behaviour is likely to recur in the future, and the infinite variety of human behaviour in such circumstances makes a cease and desist order about very specific types of behaviour problematic. A cease and desist order is enforced, ultimately, by contempt proceedings before the Divisional Court. If there is to be litigation about employer behaviour during the next local election that leads to a finding of contempt, it should not be based on whether or not such behaviour can or cannot be fit into a pattern that was found to be unlawful in the context of an election three years ago. The potential for differing contexts and variables is simply too great. Any complaints about the 2011 election should be focused on what happens in 2011 and what impact that behaviour has as that time.

26. Second, and perhaps more problematic, is the issue of the Board's ability to deal with the entire matter that concerns the applicants. While I come to no conclusion about the extent of the Board's jurisdiction, there is a great weight of case law that stands for the proposition that the Board has no jurisdiction to regulate internal union affairs, except in the specific areas designated by the Act (trusteeships, applications under sections 145 to 150, strike and ratification votes, and duty of fair representation). If remedies under section 96 in respect of an employer violation of the Act can extend as far as to provide practical remedies with respect to a local union election, then such relief should be sought at the time when the Board can actually do something about it. As the application is framed, the applicants seek to cast the Board in a rule-making role over parties peripheral to the real contest in an election and to enforce those rules with punitive sanctions which must be finally enforced by the Divisional Court.

27. To some extent, the Board's case law does create, over time, norms of behaviour that are understood in the labour relations community. No doubt, some employers find the remedies ordered by the Board to be burdensome. However, the Act does not place the Board in a rule-making role to be enforced with punitive sanctions, but rather to provide practical remedial relief to ongoing and existing labour relations problems. The rule-making and sanctioning role is out of keeping with the general thrust of the Act.

28. Third, delay is significant, not because of any prejudice to the responding parties, but because the complaint was brought after the time the Board, or indeed the Employers involved, could do anything about it. It is entirely conceivable that a complaint filed during an election campaign alleging that an employer has favoured one candidate by offering that candidate certain preferences which are denied to the other might cause the employer to re-think its refusal. Once the election has finished, the employer no longer has the opportunity to address that complaint, nor can the Board order it to do so.

29. Finally, the acts complained of are not trivial, in the sense that the election was a close one, and may have been influenced by small factors. However, the acts complained of constitute acts or words by an employer that are directly or explicitly supportive of one side in an election. Such actions may well step over the line drawn by section 70, but it is not so plain and obvious a violation of the Act the matter is free from debate.

30. For these reasons, I conclude that there is no labour relations purpose in inquiring into this complaint. I do not mean to be unsympathetic to the applicants, even if union elections are generally a long way from a polite debating society. To come close in an election is no doubt disheartening for the unsuccessful candidate in every case. In this case, however, there is no labour relations purpose to be served by allowing this complaint to go forward. I therefore exercise the Board's discretion and decline to inquire into this complaint of a contravention of the Act.

1746-08-R; 2152-08-U International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721, Applicant v. **Flynn Canada Ltd.**, Responding Party; International Union of Painters and Allied Trades, Local 1819-Glaziers v. Flynn Canada Ltd., International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721, Responding Parties

Certification – Construction Industry – Intervention – Reconsideration – Standing - Unfair Labour Practice – The Glaziers sought intervention and reconsideration after a certificate was issued to the Iron Workers for employees of Flynn – The Glaziers claimed there was a three-way agreement signed by the parties that allowed Iron Workers to provide employees to assist the Glaziers in certain construction projects, but precluded the Iron Workers from asserting any bargaining rights over the work – The Board held that the Glaziers have no standing to intervene in the Iron Workers' application for certification; rather their claim was for work jurisdiction, which is a separate and distinct matter from bargaining rights – Similarly, neither the tri-partite agreement nor a subsequent Memorandum of Agreement between the two unions assist the Glaziers in achieving standing to intervene – The Board also held that any alleged employer support for the Iron Workers' application was

insufficient to establish standing since the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for – Request for reconsideration dismissed – Unfair labour practice complaint continues, but remedies seeking to extinguish the Iron Workers' bargaining rights are struck

BEFORE: *Mark J. Lewis*, Vice-Chair.

DECISION OF THE BOARD: May 13, 2009

1. As set out in the Board's previous decisions, Board File No. 1746-08-R is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") by International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 ("Local 721" and/or the "Ironworkers"). In a decision dated September 12, 2008, the Board certified Local 721 as the bargaining agent for all ironworkers and ironworkers' apprentices in the employ of the responding employer ("Flynn") in both the ICI sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board Area No. 8.

2. On October 14, 2008, the International Union of Painters and Allied Trades, Local 1819 – Glaziers ("Local 1819" and/or the "Glaziers") sought to intervene in this application for certification and filed a request for reconsideration of the Board's September 12th decision certifying the Ironworkers. Thereafter, Local 1819 also filed an application under section 96 of the Act against both Local 721 and Flynn (Board File No. 2152-08-U) in which it sets out various particulars which it claims are also relevant to its request for reconsideration and intervention in Board File No. 1746-08-R.

3. In a decision dated November 27, 2008, the Board determined that it would schedule a hearing to deal with the Glaziers' request for reconsideration. This hearing commenced on February 2, 2009. At the conclusion of the first day of hearing, the parties had still not dealt with the preliminary motions of both the Ironworkers and Flynn seeking the dismissal of the Glaziers' reconsideration request and therefore it was determined that these motions would be dealt with by way of written submissions. Those submissions have been received and considered by the Board in reaching this decision concerning the preliminary motions for dismissal.

The Glaziers' Request for Reconsideration and Section 96 Application: Facts and Allegations

4. The particulars and material facts relied upon by the Glaziers, and which must be assumed to be true and provable for the purposes of the preliminary motions, are essentially as follows.

5. Since 2006, when it first started performing glazing and curtain wall installation work, Flynn has been bound to collective agreements with the Glaziers and has exclusively used members of the Glaziers to perform such work. However, in the Spring and Summer of 2008 Local 1819 was experiencing full employment and did not have sufficient unemployed members to meet Flynn's manpower requirements at its Maple Sports Centre project.

6. In an effort to deal with Flynn's concerns about the supply of qualified workers, a meeting was held, on May 14, 2008, involving representatives of the Glaziers, Flynn and the Iron Workers. At this meeting it was agreed that members of the Iron Workers, along with members of the Glaziers,

would be employed by Flynn, on a 50/50 composite crew basis, to perform the curtain wall installation at the Maple Sports Centre project. According to the Glaziers, this agreement to the use of a composite crew included, and was from their perspective contingent upon, the agreement of the Iron Workers and Flynn that the Iron Workers would not use their members employed at this project to establish bargaining rights with Flynn, either by way of certification or voluntary recognition. The Glaziers assert that this assurance by the Iron Workers and Flynn was in accordance with the provisions of a Memorandum of Agreement concerning work jurisdiction which the two Local Unions had entered into in August 1999.

7. As noted above, on September 4, 2008, the Iron Workers filed their application for certification. There is no dispute that this application related to workers employed at the Maple Sports Centre project and that the Glaziers were not provided with formal notice of this application. The Glaziers also claim that, contrary to the Board's requirements, the initial notice advising that the Iron Workers had filed an application for certification was not posted on the job site. Further, the Glaziers also assert that the Iron Workers deliberately timed the filing of their application for certification in order to coincide with the vacation of Flynn's Vice-President, John McManus (the representative of the responding party listed by the Iron Workers in their application), thereby insuring that there would be no response filed or postings made. However, and as is set out in the September 12th decision, Flynn did in fact file a timely response to the application for certification.

8. In addition, the Glaziers have asserted that Flynn has engaged in a course of conduct, involving at least two ICI job sites in Ottawa, designed to favour the Iron Workers. Specifically, it is asserted that commencing in or about October 20, 2008, Flynn has been transferring and laying-off members of Local 1819's sister local union in Ottawa, Local 200, and thereby insuring that the curtain wall installation work on the Ottawa job sites is done either exclusively or predominately by members of the Iron Workers to the detriment of the Glaziers, their members and their jurisdictional claims *vis-à-vis* this type of work.

9. Based on all of the above alleged facts, the Glaziers claim that:

(a) they have the requisite status to intervene in the Iron Workers application for certification;

(b) the September 12th decision of the Board certifying the Iron Workers should be reconsidered as the application for certification was untimely, was filed in violation of the May 14th agreement between these parties and as the required notice was not provided; and,

(c) Flynn and/or the Iron Workers have violated sections 7, 15, 70, 72, 73 and 76 of the Act.

10. Accordingly, the Glaziers seek various remedies from the Board, not the least of which is the revocation of the certificates issued to the Iron Workers on September 12, 2008.

11. Finally, it must be noted that the Glaziers are no longer relying on certain facts which formed part of their initial submissions to the Board. In their section 96 application, at paragraph 8 of Schedule "A", they stated:

> 8. In order to protect its position as exclusive bargaining agent for all employees of Flynn engaged in curtain wall installations, by letter dated September 3, 2008, Glaziers Local 1819 issued Work Referral Slips for each Ironworker Local 721 member employed on the Maple Sports Centre site thereby clearly establishing that the presence of Ironworkers Local 721 members of the site as part of the crew performing curtain wall installations were working pursuant to the Glaziers' Provincial Agreement and specifically the members of Ironworkers Local 721 were thereby issued permits to work under the Glaziers' Provincial Agreement.

12. A similar claim formed part of the Glaziers' intervention and request for reconsideration in the application for certification. However, at the February 2nd hearing, the Glaziers agreed that in fact they had not provided referral slips to Flynn for the members of Local 721 working at the Maple Sports Centre project and no permits had been issued by Local 1819 allowing these men to work under the Glaziers' agreement.

The Preliminary Motions

13. Both the Iron Workers and Flynn take the position that the Glaziers' request for reconsideration, at the very least, should be dismissed on a preliminary basis as the Glaziers lack the requisite status to intervene in the application for certification and as the request for reconsideration and the intervention fail to set out a *prima facie* case for the relief sought. As noted above, in considering these motions the Board has assumed all of the facts pled by the Glaziers to be true, save and except the initial assertions concerning referrals and permits (as these have now been withdrawn by the Glaziers themselves) and the allegation that Flynn failed to file a response to the application for certification, which is clearly incorrect on the face of the Board's record.

Status

14. There was no significant dispute between the parties concerning the Board's normal test for granting reconsideration. The Glaziers claim that they have met the requirements of this test while both the Iron Workers and Flynn deny this. However, both Flynn and the Iron Workers also take the position that the Board should not even consider the *merits* of the Glaziers' request as they are not entitled to intervenor status in the application for certification and therefore they lack the necessary standing to bring this reconsideration request in the first place.

15. The Board's jurisprudence with respect to what is necessary in order to establish intervenor status in a proceeding before it is both longstanding and clear. For example in *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. February 70, the Board stated the following:

> 6. A party which seeks to intervene in a proceeding before the Board must demonstrate either that it has a real direct discernible interest in the proceeding, or persuade the Board that it is able to provide the Board with assistance which will ensure that all relevant issues are properly presented such that it should be granted a kind of *amicus curiae* status. *Amicus Curiae* status, which is granted as a matter of the Board's discretion as the master of its own proceedings, has rarely been granted by the Board. (In *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, the United Steelworkers of America was granted *Amicus Curiae* intervenor status limited to making representations on the legal and policy issues raised by an application for certification by the IBEW, Local 1687 for a bargaining unit of maintenance

> electricians, notwithstanding that the Steelworkers neither represented any of the employees directly affected by the application nor sought to do so. Intervenor status was granted on the basis that the Steelworkers was the dominant trade union in the mining industry and represented many mine maintenance electricians within broader based bargaining units out of their mines. On the other hand, in *New Dominion Stores*, [1986] OLRB Rep. Apr. 519, the Steelworkers was denied such intervenor status.)
>
> 7. In order for a party to be entitled to participate in a proceeding as an intervenor, it must have an interest in the outcome of the proceeding which is direct and substantial. An interest which is merely political, which is anticipatory or speculative, or which is concerned with an indirect economic or commercial effect is not sufficient to entitle a party to participate. Nor is the fact that a decision in the proceeding may be used or referred to as a precedent in another proceeding. (See, *New Dominion Stores, supra*, at page 521; and more generally, *Re Schofield and Minister of Consumer and Commercial Affairs*, [1980] 28 O.R. (2d) 764 (Ontario Court of Appeal).)
>
> 8. It is generally not appropriate to permit an *Amicus Curiae* intervention unless the party seeking to intervene on that basis can demonstrate that its participation will provide a real and substantial input on important material issues which the Board is unlikely to receive from the direct parties, and that the participation of such an intervenor will not cause undue delay, or prejudice to a direct party.

The Significance of the Glaziers' Bargaining Rights

16. Leaving aside, for the moment, the alleged May 14th agreement between these three parties and the 1999 Memorandum of Agreement between the two unions (which are dealt with in detail hereinafter), it is now clear that the Glaziers do not otherwise have a sufficient interest in the Iron Workers' application for certification in order to obtain intervenor status. Applications for certification concern bargaining rights, rather than jurisdictional claims, and this application relates exclusively to bargaining rights for iron workers. The Glaziers, by their own admission (and reinforced in the case of the ICI sector by virtue of the Act) have no bargaining rights for iron workers. Their bargaining rights and their collective agreements only pertain to glaziers. Therefore, as there can be no direct legal effect on the Glaziers' bargaining rights as a result of this application, their bargaining rights provide no basis for the granting of intervenor status. In this sense this situation is identical to the situation dealt with by the Board in *PBS General Contractors Inc.*, Board File No. 3156-06-R (March 23, 2007), 2007 CanLII 10626 (ON.L.R.B.) and in which it stated:

> 7. For the purposes of this decision, we are prepared to treat the claim of the Painters and Carpenters at its highest, that is, that they would ultimately succeed in the related/successor employer applications and that, at a point prior to January 10, 2007, PBS was bound to collective agreements with both the Carpenters and the Painters for their respective craft units. That is the basis on which the Painters and Carpenters seek to intervene. Neither union has filed membership evidence on behalf of any person who is or claims to be an employee in the bargaining unit.
>
> 8. Both the Carpenters and Painters asserted that if the CCWU were certified, that would represent an impairment of their legal rights. Both pointed to certain types of construction work described by the employer and the CCWU (though not all of it), that falls within the work jurisdiction of their respective collective agreements. If that

> is the case, the Carpenters' and Painters' concerns are not about a conflict of bargaining rights, but a potential dispute over work jurisdiction in future jurisdictional disputes. The Carpenters argued that "clean-up" was covered by their collective agreement, assuming that the clean-up involved refuse created by drywall work. Indeed, the distinction between "trades clean up" and "general clean up" was precisely the subject of a jurisdictional dispute between Labourers Local 506 and a number of trade unions in *Ellis-Don*, [1994] OLRB Rep. Sept. 1222. That case, however, demonstrates the limitation of the Painters' and Carpenters' position. Their interests arise from a potential dispute over work assignment, not over bargaining rights. The Board has long said that it will not determine jurisdictional disputes in the context of a certification for application [sic]. Work jurisdiction claims and bargaining rights to represent employees are two different matters: see *Industrial Lighting and Contracting Limited* [1979] OLRB Rep. Oct. 985
>
> 9. The certification worksheet does indicate that the Carpenters and Painters challenged the three employees alleged to be in the bargaining unit on the basis that they were not performing bargaining unit work on the date of application. They had no specific submissions to make about the type of work such employees were performing on the hearing date, perhaps because no one's attention had been turned to that specific issue since the date of the Regional Certification Meeting. However, neither Union has any standing to pursue that issue until it can demonstrate a legal interest in the outcome. No trade union has an automatic right to intervene in the certification of another trade union to raise issues not raised by either of the parties to the application. In this case, the employer and the CCWU described the work being performed on the date differently, but it is not a difference into which the Board would ever inquire. Whichever version, or portions of either version, is correct, the persons performing the work fall within a bargaining unit of construction labourers.
>
> 10. Therefore, the legal interest of the Carpenters and Painters could not be affected by the success or failure of the certification application brought by the CCWU. Whether or not the CCWU is entitled to represent a bargaining unit of construction labourers, the result in no way affects the legal interests of the Carpenters and Painters to represent their respective craft unit. Therefore, neither has standing to intervene in this application.

17. Obviously the Glaziers have an interest in which trade Flynn assigns curtain wall installation work to. Clearly they would prefer it if the Iron Workers have no bargaining rights with Flynn as they believe that such bargaining rights may strengthen the Iron Workers', and conversely weaken the Glaziers', claim to be assigned the work which is common to the two trades. However, as bargaining rights and claims for work jurisdiction are two separate matters, the Glaziers have no interest in the outcome of this proceeding which is direct and substantial and their interest is entirely *political, anticipatory and/or speculative*. To grant the Glaziers intervenor status, based on their pre-existing bargaining rights for glaziers, in this application, which exclusively concerns iron workers, would most definitely turn this matter into a jurisdictional dispute, which the Board has repeatedly stated is not appropriate.

Referral Slips/Permits

18. As set out above, the Glaziers initially claimed that the workers on the Maple Sports Centre project that form the subject of this application for certification had been given referral slips by Local 1819 for employment with Flynn and were working in accordance with the Glaziers'

Provincial Agreement as a result of permits issued by Local 1819. Had this been the case, it is at least arguable that the Glaziers both represented individual employees claimed by both the applicant and the responding party to be within the bargaining unit applied for and that these employees were glaziers and not iron workers, and were therefore already covered by an existing collective agreement. Either position may have provided a legitimate basis for the Glaziers to intervene in this application for certification, either in its own right or as the representative of individual workers claimed to be within the bargaining unit applied for (see for example *Camarites Construction Inc.*, [1999] O.L.R.D. No. 1276). However, given the Glaziers have now acknowledged that no referral slips and/or permits were ever issued or supplied, it is simply not necessary to consider such arguments.

The Agreements

19. Further, neither the alleged May 14th tri-partite agreement not to seek bargaining rights as a result of the composite crew arrangement, nor the 1999 Memorandum of Agreement between the two Local Unions, provide a basis upon which to grant intervenor status. Even assuming these parties reached an agreement containing the prohibitions relied upon by the Glaziers at the May 14th meeting (which is specifically denied by the Iron Workers and Flynn) such an agreement in no way creates direct legal rights or interests for the Glaziers with respect to iron workers employed by Flynn. In this respect this situation is quite distinct from the Board decisions concerning the binding effect of settlements, relied upon by the Glaziers. For example, in *National Grocers Co.*, October 10, 2002 (Board File Nos. 0137-02-R, 0139-02-R, 0179-02-R and 0450-02-R), 2002 CanLII 24640 (ON L.R.B.), the decision which the Glaziers principally relied upon for this issue, the Board dealt with a settlement in the context of a direct challenge by the CAW to the bargaining rights of the UFCW. Accordingly, given that its bargaining rights were directly affected, the UFCW obviously had the necessary interest to obtain party status and therefore could, as a party to the proceedings, place the issue of the previous settlement before the Board. That is not the case here where the Glaziers' bargaining rights are not, and cannot be, directly affected by the Iron Workers' application.

20. In addition, the 1999 Memorandum of Agreement is completely silent with respect to the future acquisition of bargaining rights by either Local 721 or Local 1819 and specifically contemplates that employers may be bound to collective agreements with both Local Unions. On its face, this Memorandum simply governs and/or regulates the jurisdictional claims made by either Union in response to employer work assignments. As such this Memorandum might be relevant to a grievance or a jurisdictional dispute but it is not relevant to, and cannot provide a sufficient legal interest to obtain standing in, a certification proceeding.

21. Conceivably, the May 14th agreement or the 1999 Memorandum, while not providing a direct and specific legal interest to the Glaziers, might invest them with a sufficiently unique position and perspective, concerning matters which would otherwise be unlikely to come to the Board's attention, such that granting intervenor status on an *amicus curiae* basis might be considered. However, given the Board's conclusions hereinafter set out concerning the possible effects (or lack thereof) upon the Iron Workers' application for certification that either the tri-partite agreement or the 1999 Memorandum could conceivably have, it is not necessary to consider this alternative basis for intervenor status.

The Section 96 Allegations

22. The alleged violations of the Act pled by the Glaziers also provide no basis for their intervention in the application for certification. As noted above, a trade union has no free standing right to intervene in a certification application to which it is a legal stranger. This is the case even where that union seeks to intervene by alleging that the Act has been violated.

23. In respect to the period prior to the certificates being issued on September 12th, the Glaziers base their allegations that the Act has been was violated on the *facts* that Flynn sought to have, and was successful in having, the Iron Workers supply their members for work at the Maple Sports Centre project and that the requisite notice advising that the application for certification had been filed was not provided. In view of the longstanding and common practices in the construction industry for employers to obtain skilled workers from unions, the proposition that Flynn provided employer support to the Iron Workers in violation of the Act, and in particular sections 15 and 70 of the Act, by seeking to have Local 721 supply it with skilled workers would seem to be a somewhat tenuous one. This is especially the case here given that the Glaziers' own pleadings assert that Flynn had previously always used their members to perform curtain wall installation work and that Flynn only sought out, and used the members of, Local 721 on this one project because Local 1819 could not supply enough qualified men. Nevertheless, even if it is assumed that the Glaziers' pleadings set out an arguable case concerning employer support, this is still not sufficient to establish a basis for standing in this application for certification, given that the Glaziers hold no bargaining rights for iron workers and do not represent any individual employees in the bargaining unit applied for.

24. In support of their positions with respect to alleged violations of the Act, and in particular the significance of Flynn's alleged support for the Iron Workers, the Glaziers rely on the Board's decisions in *Thomas Construction (Galt) Ltd.*, [1982] OLRB Rep. Nov. 1727, *Covertite Eastern Ltd.*, [1996] OLRB Rep. May/June 386 and *Pre-Eng Contracting Ltd.*, [2008] OLRB Rep. Mar./April 284 (April 8, 2008). I agree with their submission that these cases make clear that allegations of employer support with respect to the acquisition of bargaining rights are extremely serious. If proved, such support can result in the Board refusing to certify a union or, in the case of a request for reconsideration, the Board revoking a union's bargaining rights. I also agree with the Glaziers' assertion that, as set out in *Wallcraft Painting*, [1989] OLRB Rep. March 306, the Board may be willing to relieve against the strict application of the test which it normally applies to reconsideration requests in situations where such a request asserts that bargaining rights were obtained as a result of employer support, given the serious nature of such a claim. However, the mere fact that someone, in this case another union, wishes to assert that a serious violation of the Act has occurred does not mean that the Board's test with respect to party status is suspended and that such status is automatically granted. Litigation before the Board is driven by the parties and, as noted above, if the Glaziers are not entitled to be a party in the Iron Workers' application for certification, they are not entitled to raise such allegations before the Board in the context of the application for certification.

25. The rationale for the above-noted conclusions concerning who can raise allegations of employer support is obvious. For example, many historic disputes and rivalries exist between unions, and in particular between unions in the construction industry. Some unions believe that their rivals regularly and routinely obtain bargaining rights by way of employer support. However, unless a union has a direct legal interest in a particular application (and/or represents an individual who does), these beliefs, however legitimately felt, do not provide an entitlement to intervene in certification applications filed by rival unions in order to allege employer support. To allow such participation

would be to turn applications for certification before the Board into an unlimited battleground, upon which rival unions could fight out their political disputes. In short, while allegations of employer support are serious, no union is invested with a freestanding mandate to enforce the Act and to use that mandate to intervene in certification applications in which it is otherwise uninvolved.

26. Here, all of the Iron Workers' and/or Flynn's alleged unlawful actions said to have taken place prior to the September 12th decision certifying the Iron Workers can have no direct effect on the bargaining rights, and collective agreement entitlements, of the Glaziers and/or their members. From a direct legal standpoint the Glaziers are completely disinterested as to whether or not iron workers employed by Flynn are represented by Local 721. To the extent the Glaziers and their members have any interest at all, it only arises with respect to the assignment of work after the Iron Workers were certified. As such, there are no particulars or material facts pled by the Glaziers in their section 96 application which can even arguably provide a basis for intervening in this certification application. At best, the alleged *underhanded manner* in which the Iron Workers came to obtain bargaining rights, and/or the manner in which Flynn allegedly dealt with members of Local 200 on the Ottawa sites following the certification, might somehow be relevant to a jurisdictional dispute involving these parties (and/or, in the case of the Ottawa situation, might potentially give rise to other specific remedies, including damages). However, neither can provide any basis for the Glaziers' intervention in the Iron Workers' certification, given it lack of direct impact upon their representation, or collective agreement, rights.

27. Finally, the Glaziers claim that they should be granted party status in the Iron Workers' application for certification as, if they are not, they will not be able to secure an effective remedy in relation to the violations of the Act they have alleged and, in particular, the alleged violation of the May 14th agreement. With great respect, I disagree and conclude that there is absolutely no reason why the Iron Workers' bargaining rights (for iron workers) must be struck down in order to provide an adequate remedy to the Glaziers. Their allegations concerning the layoff and transfer of members at the two Ottawa job sites can, if true, be easily remedied by way of declarations and the award of damages. Further, and as alluded to above, it is unclear why the Glaziers could not seek to rely on, and ask the Board to consider, the manner in which the Iron Workers obtained their bargaining rights in evaluating the respective claims for jurisdiction over the common work of these two Unions. It is work jurisdiction which is the *real* dispute between these two Unions and this employer and this should be, and is more appropriately, dealt with in the context of a jurisdictional dispute which the Glaziers have already filed with the Board (Board File No. 2137-08-JD). Thereafter, if they are able to establish that work which was awarded to the Iron Workers should instead have been awarded to them, there is no reason why the Glaziers cannot seek damages concerning the wrongly assigned work by way of grievances, particularly if they are able to establish that bad faith on the part of Flynn and/or the Iron Workers played a role in any incorrect assignments.

Lack of a *Prima Facie* Case

28. Although it is perhaps not necessary to do given the conclusions set out above concerning standing, I will also address the motions concerning the lack of a *prima facie* case.

The Glaziers' Bargaining Rights

29. As noted above, the Iron Workers' application for certification does not, and cannot, affect the Glaziers pre-existing bargaining rights and collective agreements. The latter relate solely to

glaziers while the former relates solely to iron workers. Under the statutorily imposed province-wide bargaining scheme for the ICI sector there are separate Ministerial designations, Employer and Employee Bargaining Agencies and collective agreements, for glaziers and iron workers. The simple fact that there is an overlap between some of the work performed by these two trades does not mean that once one union has established bargaining rights with an employer for its own particular trade the other union is prohibited from ever doing likewise. As these parties are well aware, and as the 1999 Memorandum of Agreement relied upon by the Glaziers establishes, many employers are bound to collective agreements with both the Iron Workers and the Glaziers and use members of both Unions, sometimes simultaneously, to perform certain common work, such as curtain wall installation.

30. Accordingly, the fact that Flynn was bound to the current Provincial ICI Collective Agreement for glaziers, effective until April 30, 2010, does not mean that any applications by Local 721 to represent iron workers, filed prior to the next open period, must be found to be untimely or to constitute interference with existing bargaining rights and/or individuals' rights to be represented by a union of their choice such that there is a violation of sections 70, 72, 73 and/or 76 of the Act. As set out above, the workers at the Maple Sports Centre that Local 721 sought to represent were performing iron workers' work on the date of application and as such it had every right to seek to represent them. These men were not referred to work by the Glaziers' and had not been issued permits to work under the Glaziers' Collective Agreement. The fact that others were doing the same work, on the same jobsite, who were referred, and who were working, in accordance with the Glaziers' agreement, simply establishes that there was a composite crew (which is not an uncommon occurrence in this industry) and does not, in and of itself, detract from Local 721's right to file its application. If thereafter either group of employees (or their respective Unions) wish to dispute their employer's assignment of common work then the correct mechanism for so doing is to file grievances and/or jurisdictional disputes under section 99 of the Act.

Notice

31. In such circumstance, where it has no direct legal interest in the outcome, Local 1819 had no entitlement to notice of Local 721's application and therefore the fact that none was provided to it does not serve as a basis for reconsidering or varying the Board's earlier decision. Individual employees within the bargaining unit do of course have a right to notice. However, the only jobsite where bargaining unit members were working on the date of application, the Maple Sports Centre project, is within the ICI sector. Local 1819 is an affiliated bargaining agent of the EBA for glaziers, and not for iron workers, and therefore it cannot represent iron workers on the job site in question. Given this, it is completely unclear to the Board how the Glaziers have any standing to assert rights which belong to employees that they do not, and cannot, represent.

32. Further, as of the date of this decision, no individual *iron worker,* who claims to have been at work in the bargaining unit on the date of application, has sought to intervene in this matter, with the assistance of Local 1819 or otherwise. This lack of action by any employee within the bargaining unit is significant as the Glaziers do not allege that there was a failure to post the September 12th decision of the Board certifying the Iron Workers (as provided for in paragraph 12 of that decision) and therefore the employees must be assumed to have had notice that the Iron Workers had filed an application pursuant to that decision. Accordingly, even assuming, as the Glaziers claim, that there was a failure to make the initial posting when this application was first filed, in these circumstances I am satisfied that such a failure does not provide an appropriate basis for reconsidering the Board' September 12th decision, at the request of the Glaziers, in view of the fact that the employees in the

bargaining unit have had subsequent notice and none have sought to intervene, relying on an alleged lack of initial notice or otherwise. With respect to this alleged failure to provide the initial notice to the employees in the bargaining unit, this case is essentially identical to the situation dealt with by the Board in *Hamilton (City)*, November 9, 2005 (Board File No. 1785-05-R), [2005] O.L.R.D. No. 4510, in which the Board reached exactly the same conclusion as I have and stated:

> Effect of No Notice to Employees
>
> 22. No Notice to Employees appears to have been posted and, therefore, the employees affected would not be aware of this application through this means. The employees affected, presumably the three the applicant sent from its hiring hall, have thereby not had an opportunity to submit anything by the deadline of September 9, 2005. *Vissers Nursery*, [1990] OLRB Rep. 989, cited by the City, is not on point under the current legislation since there is no longer any contemplation of "petitions" by employees indicating a change of heart with respect to supporting the applicant. The applicant argues that if the City did not post the Notice to Employees as soon as it became aware of the application, on September 9, 2005, it cannot rely upon this failure to get reconsideration of the Board's decision. The applicant also notes that no employees affected by the application have made any submissions following posting of either the Board's decision granting certification or the decision noting the reconsideration request. These arguments are persuasive.
>
> 23. Further the decision to certify the applicant ought not to be reconsidered simply to allow posting of notification about this application to employees affected when the City could have posted the Notice to Employees as soon as it came to Mr. Roundis' attention. The instructions on the Confirmation of Filing (B-59) received by the City gives instructions that the Notice to Employees is to remain posted for thirty (30) days so at the time Mr. Roundis realized his responsibilities in this regard only about a week of this period had been lost. If this posting did not occur, which is undoubtedly attributable to the City's own conduct, the posting of the Board's decision certifying the applicant would have allowed employees who have serious issues with respect to their support of the applicant or the process to file with the Board any submissions in opposition. In the circumstances, the three employees affected had been sent to the City from the hiring hall and therefore they would not have been unable to understand what this decision meant and take whatever steps were necessary to protest it.

The Agreements and Employer Support

33. In fact, once it became clear that the Glaziers had not referred, or issued permits to, the employees in the bargaining unit applied for, the only *unusual issues* raised by them in respect of this application for certification relate to the allegations of employer support and the alleged May 14th agreement, which was entered into, according to the Glaziers, in accordance with the provisions of the 1999 Memorandum of Agreement. Upon analysis, neither would lead the Board to vary its earlier decision or to grant any of the relief requested in respect to the application for certification, even if all of the facts relied upon by the Glaziers are true and they had the necessary standing to pursue them.

34. In determining whether the Glaziers have, on the basis of the May 14th agreement, pled a *prima facie* case for the relief they have requested in respect of the application for certification it is necessary to assess the overall statutory context of the Iron Workers' application. This is an application for certification filed under section 128.1 of the Act. Given that no other union held existing bargaining rights for, and there was no current collective agreement covering, iron workers,

this application is timely in accordance with the provisions of subsection 7(1) of the Act. Further, no previous applications had been filed in respect to this bargaining unit such that any of the mandatory or discretionary bars provided for by the Act, or the Board's discretion not to entertain a subsequent application for certification under subsection 111(c)(3), apply. In such circumstances, the Board has no discretion to refuse to accept, and/or to simply dismiss, this application even if Local 721 had previously promised the Glaziers and/or Flynn that it would not seek to certify Flynn's iron workers.

35. The provisions of section 128.1 of the Act are exceedingly clear in terms of how an application filed under this section is to be dealt with. Subsection 128.1(4) states the following:

> **128.1** (4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),
>
> (a) the bargaining unit; and
>
> (b) the percentage of employees in the bargaining unit who are members of the trade union.

36. As the Board set out its September 12th decision, the bargaining unit applied for by the Iron Workers is appropriate under the provisions of subsection 158(1) of the Act which specifically mandates the appropriateness of certain specific bargaining units within the context of the statutorily imposed province-wide bargaining scheme in the ICI sector. Even if the Glaziers' allegations as to what occurred on May 14th are true, once the application was filed it is unclear how the Board has the discretion to conclude that a statutorily imposed bargaining unit is not appropriate (or, given the Glaziers' overall position, that in fact no bargaining unit is appropriate), and/or that there were no employees in this bargaining unit, simply on the basis that the applicant had previously agreed not to file an application. Therefore, in these circumstances, having determined that more than 55% of the employees in the bargaining unit were members of the Iron Worke[illegible]he Board's choices are directly limited by subsection 128.1(13) which allows it to either certify t[illegible]licant or hold a representation vote.

37. Subsection 128.1(4) does allow the Board to consider evidence and submissions relating to allegations that sections 70, 72, and 76 of the Act have been violated, or that there has been fraud or misrepresentation, in making the determinations required of it under section 128.1 of the Act. However, nothing in this subsection provides the Board with the discretion to refuse to entertain an application for certification as the Glaziers assert should be the case here. Rather, subsection 128.1(4) simply makes clear that the Board may consider such allegations in the context of exercising its powers found elsewhere within section 128.1, and in particular in determining if the membership evidence accompanying an application for certification is an accurate indicium of the true wishes of the employees within the bargaining unit.

38. Dismissing an application where the union appears to enjoy the support of more than 55% of the employees in the bargaining unit is provided for under subsections 128.1(8) and (9) which state:

> **128.1** (8) Subsection (9) applies where the trade union or person acting on behalf of the trade union contravenes this Act and, as a result, the membership evidence provided in or with the trade union's application for certification does not likely reflect the true wishes of the employees in the bargaining unit.
>
> (9) In the circumstances described in subsection (8), on the application of an interested person, the Board may dismiss the application for certification if no other remedy, including a representation vote directed under clause (13)(b), would be sufficient to counter the effects of the contravention.

39. However, here there are no allegations which suggest that what the Iron Workers or Flynn allegedly did prior to September 4th (the date of application) in any way altered the true wishes of the employees in the bargaining unit concerning whether or not they wished to be represented by Local 721. Based on the submissions of the parties, it is apparent that all concerned always felt that the members of Local 721 who went to work for Flynn would want to be represented by their own Union. That is the precise reason why the Glaziers were so concerned and why they wanted an assurance from the Iron Workers that they would not take advantage of this natural desire on the part of these employees in order to apply for certification. As such, the discretion provided to the Board under these two subsections simply does not apply in these circumstances.

40. Section 15 of the Act describes certain specific circumstances in which the Board is not to certify a union. It states:

> **15.** The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.

41. However, as the Board has repeatedly stated, it is not every action that an employer takes which might in some way *support* a union that will lead to the Board refusing to certify that union. For example, in *Covertite Eastern Ltd., supra,* the Board stated the following:

> 55. Section 15 [formerly section 13 of the Act] provides as follows:
>
> > 15. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.
>
> 56. The Board has made it clear in its jurisprudence that the purpose of section 15 is to preserve the arm's length relationship between unions and employers which is fundamental to the structure of the Act. A purposive, rather than literal, application of the section has found favour in the Board's jurisprudence, and s in our view the appropriate approach. Thus, not everything that an employer does that might be said to be supportive of an organizing campaign is sufficient to warrant the application of section 15. It is activity which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent. See, for example, *Edwards* v. *Edwards*, (1952), 52 CLLC para.

> 17,027 and *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 and *University of Toronto*, [1988] OLRB Rep. March 325. The purposive interpretation has meant that the provision of a list of employees to a union in an organizing drive by the employer contravened section 13 [now 15] in *Tri-Can*, [1981] OLRB Rep. Oct. 1509 but not in *Continuous Mining*, [1990] OLRB Rep. April 404, because in the former the trade union applicant had been formed to thwart another union's organizing attempts, while the applicant in the latter had a long history of arm's length collective bargaining with the parent of the employer.

42. In this case, all agree that Flynn was actively involved in getting the members of Local 721 to go to work for it on the Maple Sports Centre project. In terms of this involvement, the Glaziers specifically rely on the following material facts, set out in paragraphs 5 and 6 of Schedule 'A' of their intervention filed on October 14, 2008:

> 5. Through the Spring and Summer of 2008, Glaziers Local 1819 experienced full employment. Flynn approached Glaziers Local 1819 concerning manpower requirements for Maple Sports Centre Project with respect to curtain wall installations. As a result of a concern for manpower and the requirements of the construction schedule, Flynn approached Glaziers Local 1819 to ensure an available supply of glazier curtain wall
> installers.
>
> 6. In an effort to accommodate Flynn's concern with respect to manpower for the Maple Sports Centre Project, a meeting was held on May 14, 2008 at the Flynn offices, 6300 Northam Drive, Mississauga, ON. The meeting was attended by Glaziers Union Representatives William Nicholls, Dernot Lynch and Sean Keogh Flynn

43. There are no allegations that, having obtained the men it needed from Local 721, Flynn instructed or directed these men to support Local 721's organizing activities or directed Local 721 to file its application for certification. All that the material facts pleaded by the Glaziers actually establish is that iron workers who were members of Local 721 came to be employed on the job site, with the direct knowledge and consent of the Glaziers, because Flynn needed skilled workers. Local 1819 could not supply these workers but the Iron Workers could. It is hardly surprising, given that they were already members of Local 721, that these iron workers wished to be represented by the Iron Workers in their employment with Flynn, just as the Glaziers on site presumably wanted to be represented by their own Union. This is, then, not a case where the employer has gerrymandered its workforce and/or otherwise unduly influenced any of its employees such that it is possible to infer that the employees in the bargaining unit have not exercised a free choice in the selection of their bargaining agent. As such no *prima facie* case, which could lead the Board to refuse to certify the Iron Workers on the basis of section 15 of the Act, is set out.

44. In their submissions to the Board, the Glaziers do not address in any detail what the Board can and cannot do once an application is filed under section 128.1 of the Act but instead focus on the Board's general policy of encouraging the settlement of labour relations matters by the parties involved and thereafter holding those parties to the settlements they have made. In this respect they place particular reliance on the Board's decision in *National Grocers Co., supra*, which states:

> 14. As noted above, the Act also reflects a policy of encouraging parties to resolve their own disputes. The Board has always considered that a resolution parties can

> reach themselves is preferable to one the Board could come up with. An agreement parties achieve themselves is more likely to reflect their real needs than a remedy imposed by the Board after divisive litigation. Of course, a settlement also saves the public and the parties the time and expense of litigation. The Act's enforcement mechanism highlights the interest its drafters had in promoting settlements. Under section 96(7), a breach of settlement is considered to be a complaint under section 96(1) i.e. that there has been a violation of the Act itself. The Board therefore has the full range of remedies under section 96(4) at its disposal in determining what consequences should flow from the breach. If a party settles a Board matter by promising to do something and then does not do it, that party will be in the same situation as if it violated the Act.

45. I agree with the general policy in favour of upholding and enforcing settlements set out by the Board in *National Grocers Co., supra,* and *Northfield Metal Products Limited,* [1991] OLRB Rep. May 664 and *All Canada Crane Rental Corporation,* [2003] OLRB Rep. Sept./Oct. 693 (September 11, 2003) (which were also relied on by the Glaziers in support of this proposition). However, this general policy, no matter how important it may be to the scheme of labour relations in our Province, does not provide the Board with any additional powers that it does not otherwise have under the Act. Rather, this general policy in favour of upholding settlements can only be used by the Board in determining how it should exercise the specific statutory powers it has been provided with.

46. In this respect, the particular factual circumstances in *National Grocers Co., supra,* were of great significance to the Board's ultimate decision in that case. There, the CAW had filed an application for certification concerning a bargaining unit that was already covered by an existing collective agreement between the employer and the UFCW, entered into as a result of voluntary recognition. In seeking the dismissal of the CAW's application, the UFCW relied on a previous agreement between the two unions in which they had explicitly agreed not to challenge each other's bargaining rights. The agreement between the two unions was in writing and signed and accordingly constituted a settlement as defined in subsection 96(7) of the Act. The Board held that the CAW's application for certification and challenge to the UFCW's bargaining rights was a clear violation of the agreement between the two unions and was therefore a violation of subsection 96(7) of the Act which the Board had the necessary jurisdiction to remedy, pursuant to the provisions of subsection 96(4), by either directing the CAW to withdraw their application or by dismissing their application. Specifically, the Board stated:

> 15. Local 1000A, Local 175 and the CAW have an agreement pursuant to section 96(7). The Memorandum of Agreement set out in paragraph 5 is a settlement of several Board proceedings which were ended when the parties fulfilled their promises to withdraw the applications. If the M.O.A. has been violated, the Board has the full range of remedies under section 96(4) to choose from to restore Local 1000A to the position it would have been in had the breach not occurred. The CAW argues that the M.O.A. is not a settlement under section 96(7) because the employer parties to the earlier disputes were not parties to the agreement. It relies upon certain comments of the Board (differently constituted) in Penegal Trim & Supply Ltd. [1998] O.L.R.D. No. 3834 (referred to as Penegal Trim No.1). The facts of this case are different from Penegal Trim No. 1 and it is distinguishable on that basis. The agreement in issue in Penegal Trim No. 1 involved the division of work among trades in the construction industry. It is the employers who normally assign the work to the different trades. Therefore, the fact that the employers had not been parties to that agreement may have had a significance that does not exist in this case. Furthermore, the relevant comments in Penegal Trim No.1 appear to be obiter. Nevertheless, to the extent that

Penegal Trim No.1 stands for the principle that a settlement of a Board proceeding must be signed by all parties to that proceeding in order to be enforceable against the signatories I respectfully disagree. Local 1000A and Local 175 and the CAW's predecessor were parties to the litigation listed in the M.O.A. They clearly entered into the M.O.A. to resolve that litigation. The disputes in those cases, like this one, were essentially disputes between the unions. The settlement required that the applications be withdrawn which they were. Section 96(7) does not require all of the parties to a Board proceeding to sign an agreement in order for it to be enforceable. Of course, the settlement is only binding on those who do sign it. In this case it is binding on the three unions.

16. The promises the parties made to each other in the M.O.A. were to cease their ongoing attacks on each other before the Board and at arbitration and also not to attack each other in future. They promised to respect each other's bargaining rights. The CAW argues that the word "respect" is not defined in the agreement and therefore can be given little meaning. Local 1000A rejects that assertion and says that everyone knows what "respect" means in this context. It points out that the word is used in the Canadian Labour Congress constitution to connote a ban on raiding. The Board agrees that the word "respect" used in this context is not ambiguous. The Board is informed by its experience in labour relations matters. It knows that when trade unions talk about "respecting" each other's bargaining rights they are talking about not seeking to displace each other as the representative of employees. In the M.O.A., the parties have not only agreed to respect each other's bargaining rights, they have clearly stated that the agreement applies whether those rights were achieved by certification or voluntary recognition. Local 1000A has bargaining rights for the employees at Maple Grove warehouse. It either has pre-existing rights to represent those employees or it has obtained them through voluntary recognition. The CAW is seeking to have those bargaining rights terminated and to replace Local 1000A as the representative of the employees. That is a violation of M.O.A. The CAW says that the agreement does not mean that it cannot challenge voluntary recognition agreements under section 66. However, it is difficult to understand what else the parties could have intended when they chose to specify rights gained through voluntary recognition. The CAW never explained what else it had promised by saying it would "respect" bargaining rights achieved by voluntary recognition if it was not promising not to bring applications such as these. The CAW called no evidence to demonstrate that the words meant something besides their obvious meaning. The Board finds that the CAW violated the M.O.A. by filing the applications.

...

20. Local 1000A asks the Board to remedy the CAW's breach of the agreement by dismissing its certification and its section 66 applications. The CAW argues that that is an extraordinary remedy which the Board cannot, or should not, grant. It is certainly unusual for the Board to dismiss a certification or section 66 application as a remedy for a breach of a subsection 96(7) settlement. However, the Board has no doubt that it can do so under the extremely broad powers of subsection 96(4) if that is necessary to put the parties in the position they would have been in had the agreement been complied with. Subsection 96(4) says that where "...the Board is satisfied that a trade union... has acted contrary to this Act it shall determine what, if anything, the ...trade union...shall do or refrain from doing with respect thereto..." The subsection goes on to say that the remedy may include an order that the trade union cease doing the acts complained of and/or that it rectify the acts complained of. Ordering the

dismissal or withdrawal of the CAW's applications would fit within those broad parameters. The Supreme Court of Canada has recognized that the remedial jurisdiction of a labour board is broad and that its discretion in exercising that remedial authority should not be interfered with providing the remedy is not punitive in nature; does not infringe the Charter of Rights and Freedoms; has a rational connection to the breach and its consequences and does not contradict the objects or purposes of the governing legislation. (See *Royal Oak Mines Inc. v. Canada Labour Relations Board*, [1996] 1 S.C.R. 369; 133 D.L.R. (4th) 129).

21. The Board therefore finds that the CAW has breached the M.O.A. and that pursuant to subsection 96(4) of the Act it has the authority to order that its applications be withdrawn or to dismiss them as a remedy for the breach. However, in any application under subsection 96(4) the Board has a discretion as to whether it will grant a remedy. In this case the most persuasive argument against the Board dismissing the applications, or ordering their withdrawal, is a discretionary one. As noted above, one of the policies enshrined in the Act is that employees should be able to choose their bargaining agent. By ordering the dismissal or withdrawal of these applications, the Board would be preventing the employees at the Maple Grove warehouse from choosing the CAW as their bargaining agent until the open period of Local 1000A's collective agreement with the company. (Assuming that the CAW has given reasonable notice that it is terminating the M.O.A. by then.) It was the Board's concern for the right of employees to choose their bargaining agent which caused the Board to express reservations about the remedy being sought in its decision of July 18, 2002. That was also one of the concerns expressed by the Board in *South Huron Hospital* [2000] O.L.R.D. No. 915. However, the applications in *South Huron Hospital* did not deal with settlements of Board proceedings in which the parties clearly undertook not to challenge each other's bargaining rights. The Board has considered this matter further since its decision of July 18, 2002 and has decided that the competing policy concerns weigh in favour of enforcing the settlement. First of all, this application (unlike *Penegal Trim No. 1, supra*) was not brought by the employees themselves and Local 1000A acknowledges that the settlement would not be enforceable against them. The CAW says it is bringing the application "on behalf of employees". However, the distinction is a significant one. The CAW has agreed to "respect" the bargaining rights of Local 1000A and has therefore agreed not to act on "behalf of employees" if that means it is not respecting Local 1000A's bargaining rights. Any application for certification, or under section 66, is on behalf of some employees. The CAW must have contemplated that when it signed the M.O.A. Nevertheless, there is an impact on those employees who want to be represented by the CAW. However there is a limited impact on the employees in the bargaining unit overall. The employees themselves could have filed an application under section 66 of the Act in the first year of operation of the collective agreement if they did not want to be represented by a trade union. That right was not affected by the M.O.A. The employees may exercise that right in a few years when the open period occurs. Furthermore, a decision to enforce the settlement does not affect the employees' right to be represented by a different trade union. Any other trade union could have filed a section 66 and a certification application during the first year of the collective agreement and may do so in the next open period. Therefore, when the Board's concern about the employees being able to choose the CAW *this year* is weighed against enforcing a settlement of several Board proceedings, the balance is in favour of enforcing the settlement. The settlement presumably saved the Board and the parties considerable time and litigation expense. The CAW promised not to file an application like the ones it has filed here. Local 1000A and Local 175 may not have entered that settlement without that mutual promise.

47. In this case, the Glaziers do not, and cannot, rely on subsection 96(7) for very obvious reasons. Subsection 96(7) states:

> **96.** (7) Where a proceeding under this Act has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

Therefore, based on the explicit wording of the Act, it is not every failure to abide by the terms of a settlement between parties which can lead the Board to find that this particular subsection of the Act has been violated. For subsection 96(7) to apply, the settlement must settle a proceeding under the Act, must be reduced to writing and must be signed by the parties.

48. Even assuming that the alleged agreement reached on May 14th, including the promise by the Iron Workers that they would not apply for certification, constituted the settlement of a proceeding under the Act (which is by no means clear) it was certainly not put in writing and signed. It does not, and cannot, constitute a settlement as defined by subsection 96(7). Therefore, the failure of the Iron Workers and/or Flynn to live-up to the alleged agreement cannot constitute a violation of this subsection of the Act and thereby provide the Board with the power to fashion a remedy, under subsection 96(4), in response to the Iron Workers' application for certification, as the Board was able to do with respect to the CAW's application in *National Grocers Co., supra.*

49. The 1999 Memorandum of Agreement did clearly settle a proceeding under the Act, is in writing and is signed. However, although the Glaziers claim that the May 14th verbal agreement was made in accordance with the 1999 Memorandum of Agreement, they do not specifically allege that by applying for certification the Iron Workers breached this Memorandum. Further, it is apparent on the face of the Memorandum itself that Local 721's filing of an application for certification for iron workers cannot constitute a breach of its terms.

50. The 1999 Memorandum of Agreement states:

> MEMORANDUM OF AGREEMENT
>
> BETWEEN:
>
> International Brotherhood of Painters and Allied Trades, Local 1819
>
> ("Local 1819")
>
> - and -
>
> International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 721,
>
> ("Local 721")
>
> WHEREAS the two Unions have overlapping claims to work claimed by both Local 1819 and Local 721;

AND WHEREAS Local 721 has filed several grievances involving work claimed by both Local 1819 and Local 721 against PCL Construction Canada Inc. and McKay-Cocker Construction Limited (OLRB File Nos. 2490-98-G, 2491-98-G and 3858-98-G;

AND WHEREAS the parties are desirous of resolving their difference;

The Parties agree to the following terms of settlement:

1. The parties agree that from the date first this Memorandum of Agreement is signed by both parties, should a general contractor or trade contractor assign and/or subcontract work claimed by both Local 1819 and Local 721 to members of either Local 1819 or Local721, the Unions whose members were not assigned the work will not complain, grieve, file a jurisdictional dispute or otherwise challenge the work assignment to members of the other trade. This Agreement applies to all general contractors, whether any given general contractor is bound to only one or both of the Union parties to this Memorandum. Where a general contractor bound to both Unions and/or a trade contractor bound to both Unions performs the work claimed by both Unions, with direct employees, the general contractor, trade contractor shall perform such work with a composite crew of equal numbers of members of Local 1819 and Local 721 performing all work functions interchangeably.

2. If a general contractor which is bound to only one of the Union parties subcontracts with a trade contractor which is not bound to either Union, the Union which possesses bargaining rights with the general contractor shall grieve the non-union contracting and/or subcontracting. Similarly, the Union which possesses bargaining rights with the general contractor will grieve any instance of the general contractor directly employing persons to perform the work claimed by both Unions who are not members of either Union.

3. If a general contractor and/or trade contractor bound to both Unions assigns, performs and/or subcontracts work claimed by both Unions using a non-union subcontractor or employing directly persons who are members of either Union, the Unions shall, jointly grieve to enforce their subcontracting collective agreement rights and the assignment and performance of the work claimed by both Unions to a composite crew consisting of equal numbers of members of Local 1819 and Local 721 performing all work functions interchangeably.

4. Local 721 shall request leave of the Board to withdraw its Referrals described above. This represents full and final settlement of the dispute between the parties over the work described in these referrals and no further applications or proceedings will be brought by either Local 1819 or 721 in this regard. Specifically, the parties agree that neither of them will file a Complaint Concerning Work assignment over the work assignments referred to in these grievances. This part of the Memorandum is only binding upon the Parties and the Board grants them leave requested. If the request for leave to withdraw is opposed by either PCL Construction Canada Inc. or McKay-Cocker Construction Limited or both, Local 1819

will intervene at the Ontario Labour Relations Board in support of Local 721's position.

5. Local 721 shall withdraw the Application for Judicial Review, Ontario Court (General Division) (Divisional Court) File No. 15/99. There shall be no order as to costs therein.

6. This Memorandum of Agreement can be terminated by either Party after providing sixty (60) days advance notice to the other Party.

Signed at Toronto.

("Aaron Murphy")	("Dermot Lynch")
Aaron Murphy	Dermot Lynch
For Local 721	for Local 1819
Date: Aug. 24, 1999	Date: Aug. 13, 1999

51. As already noted, this Memorandum is completely silent with respect to the future acquisition of bargaining rights by either Union and very clearly contemplates companies being bound to collective agreements with both Unions. At best, this Memorandum prevents either Union taking action (which might possibly include filing an application for certification) which challenges an employer's decision to assign work to members of the other Union. Here, all agree that Flynn assigned the work at the Maple Sports Centre project to a composite crew made-up of members of both Unions and therefore the fact that the Iron Workers subsequently filed an application for certification, in respect of their members who were on site as part of this composite crew, cannot conceivably constitute a challenge to the assignment of work to the Glaziers.

Conclusion

52. In view of all of the above, the Glaziers' request for reconsideration of the Board's September 12th decision in Board File No. 1746-08-R is hereby dismissed. Further, the Board declares that any of the remedies seeking to extinguish the Iron Workers' bargaining rights for Flynn, requested by the Glaziers' in Board File No. 2152-08-U, are hereby struck. However, that is by no means all of the remedies requested by the Glaziers in their unfair labour practice and, therefore, this application may proceed with respect to the other remedies which have been requested.

1307-07-R; 2112-07-R Communications, Energy and Paperworkers Union of Canada (CEP), Applicant v. **GreenField Ethanol Inc.,** Responding Party; Communications, Energy and Paperworkers Union of Canada, Local 2003, Applicant v. GreenField Ethanol Inc., Responding Party

Bar – Bargaining Unit – Certification – Representation Vote – CEP initially applied to certify the utilities department of the employer's employees – The employer disputed the appropriateness of the unit but failed to provide a different unit description and did not file a s. 8.1 objection – Although the CEP won the representation vote, the Board expressed concern about the propriety of the unit applied for, and sought submissions – Following receipt of the

employer's submissions, the CEP filed a second application for certification, for a potential craft bargaining unit (operating engineers) – The Board determined that the original unit applied for was not appropriate and ordered a vote in an all-employee bargaining unit in the first application – The CEP then sought to withdraw the first application; the second vote did not take place – The Board addressed two issues: whether any conditions should attach to the withdrawal of the first application, and whether it should refuse to consider the second application – The Board held that when it ordered the second representation vote in the original file, it was signaling that the first vote was not meaningful and could not be considered "the" representation vote contemplated by s. 7(10) of the Act, which would lead to a mandatory bar – Because the bargaining unit voted on in the first vote was not appropriate, there was no expression of employee wishes in an appropriate unit – The union's withdrawal of the application before the second vote could only lead to the discretionary bar found in s. 7(9), and the Board chose not to impose a discretionary bar – Second application for certification referred to Registrar for hearing

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Melissa Kronick* for the applicant; *Alan Freedman* for the responding party.

DECISION OF THE BOARD; May 20, 2009

1. These are two applications for certification. By decision dated October 23, 2007 the Board deferred consideration of the second application, Board File No. 2112-07-R, until the first application had been determined.

2. By decision dated February 25, 2009 the Board stated with respect to the first application:

> 2. The Board hereby confirms that the union has withdrawn its application in Board File No. 1307-07-R. The Board refers these matters to the Registrar to be scheduled for hearing on three issues.
>
> (i) Should the Board attach conditions to the union's withdrawal of its application in Board File No. 1307-07-R
>
> (ii) Should the Board refuse to consider Board File No. 2112-07-R; and
>
> (iii) Can the union be certified in Board File No. 2112-07-R assuming it is not barred?
>
> 3. If the parties agree to deal with all or some of these issues through written submissions they can advise the Board of this agreement. If the parties agree that they will only argue issues one and two at the hearing, they can advise the Board at or in advance of the hearing of these matters.

3. The matter came back on for hearing. The parties agreed to deal only with issues one and two at the hearing. This decision determines those issues.

4. For the purposes of this decision it is useful to set out the facts including the litigation history.

5. The facts relevant to the issue presently before the Board are not in dispute. The employer is a manufacturer of, among other things, industrial ethanol fuel. It has approximately 80 employees at its plant in Chatham which is the subject of these applications. The employees work in several departments.

6. On July 13, 2007, the union (in its first application) applied to represent all employees in the utilities department in the following bargaining unit:

> all of the employees of Greenfield Ethanol in the City of Chatham employed in the utilities department, save and except Chief Operator and those above the rank of Chief Operator.

7. The employer filed a response to the application for certification. In its response the employer stated that the bargaining unit applied for was not appropriate because it was a department-based bargaining unit. It advised the Board that there were 17 employees in the bargaining unit applied for. Despite its objection to the bargaining unit applied for, the employer did not propose a bargaining unit which it believed was appropriate – it left that part of the Board's response form blank. In addition, the employer did not give the Board notice pursuant to s. 8.1 of the *Labour Relations Act, 1995* (the "Act"). As noted, it appears that there are approximately 80 employees in all of the employer's departments.

8. The Board ordered a representation vote. Because the employer did not propose an alternate bargaining unit, the voting constituency which the Board directed comprised only the unit which the applicant applied for. Neither the union or the employer objected to that voting constituency and the representation vote was held. The ballots were counted and the union won the vote 5 to 2.

9. The matter came on for hearing. The hearing was adjourned on the agreement of the parties after the panel of the Board hearing the matter expressed some concern about whether the unit applied for was appropriate. The parties agreed to file written submissions on the bargaining unit issue. In accordance with that agreement the employer filed extensive written submissions about whether the unit applied for was appropriate. Following that, the union's Local 2003 filed its application in Board File No. 2112-07-R (the "second application"). In the second application Local 2003 only applied for the employer's operating engineers. In other words, in the second application what may be a craft local applied for a potential craft bargaining unit of operating engineers. One utilities department employee who was covered by the first application was not covered by the second application because he is not an operating engineer.

10. By decision dated October 7, 2007 the Board directed a vote in the second application. The Board's decision does not refer to the first application.

11. By decision dated October 23, 2007 the Board postponed consideration of the second application (pursuant to s. 111(3)(b) of the Act) and listed the two applications for determination by the panel hearing the first application.

12. The matters came on for hearing again for two purposes; to determine whether the unit the union applied for in the first application was appropriate and, if it was not, whether the first application then ought to be dismissed.

13. By decision dated January 15, 2009 the Board confirmed/determined that the departmental unit applied for was not appropriate but that the Board would not dismiss the first application. By decision dated February 3, 2009 the Board ordered a second vote in an all employee bargaining unit in the first application.

14. On February 4, 2009, the union advised that it intended to withdraw the first application. The second vote ordered in the first application did not take place. The employer requested that the Board impose a "bar" on subsequent applications (including the second application) pursuant to the Act or that the Board attach conditions in the form of a bar to the withdrawal. The Board then issued its February 25, 2009 decision.

Discussion

15. The Act contains several "bar" provisions. However, the parties agree that the only bar provision which might apply to this situation which provides for a mandatory bar is section 7(10) which states:

> 7(10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is withdrawn.

16. The employer's argument relies on a plain reading of the section: a representation vote was held and the union withdrew its application after that vote. Therefore, it says a one year bar applies.

17. The employer notes that the section refers to "the" representation vote. It says that "the" representation vote is the vote which was ordered, pursuant to s. 8(2), after the Board determined there was more than 40% support for the union in the unit applied for. The certification provisions of the Act speak to "the" representation vote, that being the vote which is held after the Board determines that the union appears to have the support of 40% or more employees *in the unit it applied for*. In this regard s. 8(5) directs that "the" representation vote be held within five days of the application being filed and s. 8(8) gives the Board the authority to hold a hearing after "the" representation vote has been taken.

18. The union acknowledges that had it withdrawn its application before the Board's February 3, 2009 decision (which ordered a second vote in the first application) and after the first vote, s. 7(10) would apply and there would be a bar. It also acknowledges that had the Board ordered a vote of an all employees bargaining unit in the first place there would also be a bar. However, the union argues that now that a second vote has been ordered in the first application no bar applies.

19. The thrust of the union's argument is that the decision ordering a second vote in the first application made the first vote of no effect and therefore the bar does not apply; the second vote became "the" representation vote and the union withdrew its application before that vote was held.

20. The union's argument, in effect, leads to an interpretation which adds the words "proper, or effective", in conjunction with "the representation vote". This view has an attractiveness to it. For

example, it would make sense if there was some defect in a first representation vote that necessitated the holding of another vote, or, perhaps, if as a result of improper conduct, the true wishes of the employees were not reflected in a first vote so that a second vote were held, one might say in these cases that the first vote was a nullity.

Decision

21. There is a labour relations and statutory context to the debate between the parties as to the appropriate interpretation of s. 7(10). The first part of that context is the purposes of the "bar" contained in s. 7(10) and elsewhere in the Act. Those purposes, were discussed by the Board in connection with its earlier policy (before s. 7(10) was enacted) of imposing a six month bar if the union lost the vote or withdrew after the vote was held. Those discussions of policy are directly relevant to a consideration of s. 7(10). In *Bristol Place Hotel*, [1979] OLRB Rep. June 486) the Board described them as: to provide a cooling off period during which the employees may assess their position with respect to their decision to represented by the applicant (see *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441); or because the Board does not consider repetitious applications where the membership evidence has been fully tested by a vote to be in the interest of sound labour relations (see *Campbell Soup Company Ltd.*, [1968] OLRB Rep. Feb. 1091). Similarly, where the request was made after the vote was held, the Board imposed a bar because "a trade union should not be permitted to avoid the risk of defeat inherent in a representation vote".

22. It is apparent that the position advanced by the employer does not coincide with the purposes of the bar. The union has not lost a vote and to the extent the union seeks to avoid election defeat it is doing so in advance of the vote that might result in that defeat. These are circumstances where it is difficult to see any "purpose" for a bar being imposed. Indeed, the circumstances before the Board are similar to the kind of circumstances – the union not having enough support in the proper bargaining unit to obtain a representation vote – where a bar would not arise (see s. 8.1). Of course, the purpose of the Act and the intention of the Legislature must be gleaned from the words in the statute.

23. The statutory context also does not provide much support for the employer's interpretation. Part of that context is the recognition in the Act that there may be more than one representation vote connected with a particular application. This fact is made clear by several sections: s. 11(2) which authorizes the Board to order that another representation vote be taken if, as a result of misconduct, the true wishes of employees were not reflected in a representation vote; s. 111(5) which gives the Board the power to hold additional representation votes in a bargaining unit to determine the true wishes of employees; and s. 111(6) which permits the Board to hold "run off" representation votes where two or more unions are on a ballot.

24. In this context the idea that there can only be one "the" representation vote does not make much sense. It makes more sense to have the bar apply where the representation vote is meaningful or could be meaningful and reflects the true wishes of the employees in an appropriate bargaining unit. (I note that does not require that an appropriate bargaining unit has to be decided. It only means that the vote has to be such so that if an appropriate bargaining unit is determined, the vote was held among employees in that bargaining unit).

25. It also is important to note that, there is another provision which has on its face, direct application to the facts before the Board. That section is section 7(9) which states:

> **7.** (9) Subject to subsection (9.1), if the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.

Section 7(8) and (9.1) are not directly relevant in this case.

26. In my view there may be a conflict in the Act between s. 7(9) and 7(10) on these facts if the employer's interpretation is accepted. The union's withdrawal of its first application is both a withdrawal of an application for certification after "the" representation vote is taken and a withdrawal of the application before "a" representation vote is taken. Both statutory provisions apply and the conflict cannot be resolved unless the first representation vote is given no weight and is therefore not considered to be a representation vote for the purpose of s. 7(10). This gives credence to the idea that s. 7(10) does not apply unless a first representation vote could be meaningful. A meaningful vote is a vote that could (after all disputes are resolved) result in the union being certified or the application dismissed.

27. Section 10(1) and (2) provides:

> **10.** (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
>
> (2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

The first vote, although held in the bargaining unit the union requested, was inadequate for the purpose of ascertaining the level of support of employees in the appropriate bargaining unit. That is because employees in the appropriate bargaining unit were not given the opportunity to vote and did not vote. Many more (a vast majority) employees in the appropriate bargaining unit were not afforded the opportunity to vote than actually did vote. Therefore, whether the union won or lost the first vote would have no effect; the Board could not act until it determined the appropriate bargaining unit and held a vote among employees in that unit.

28. Accordingly, once the Board orders a second representation vote in order to ascertain the true wishes of the employees in a bargaining unit determined to be appropriate by the Board, the first representation vote has no weight [is a nullity] and the second representation vote becomes "the" vote for the purposes of s. 7(10) and "a" vote for the purposes of s. 7(9). In other words, if the union withdraws its application before the second representation vote, then a discretionary bar may apply pursuant to s. 7(9); if the union withdraws its application after the second representation vote, then the

mandatory bar in s. 7(10) would apply. This interpretation resolves any potential conflict between subsections (9) and (10) of section 7, is consistent with a purposeful reading of the statute and makes sound labour relations sense.

29. For all of these reasons I conclude that no mandatory bar applies.

30. I would not impose a discretionary bar here either. Given the mandatory provisions in the Act, the Board is generally reluctant to impose a discretionary bar except in extraordinary circumstances, or where it appears that the union is engaged in conduct contrary to the spirit of the vote provisions of the Act. Here, the union applied for what it believed to be an appropriate bargaining unit. As it turns out, the unit applied for was not appropriate and a vote was eventually ordered amongst the employees in the appropriate unit. The union recognized it would not win a vote in an all employee unit, identified an opportunity to represent the employees whom it wanted to represent and so withdrew the first application and then applied for the bargaining unit it wanted. There is no reason to impose a bar or attach other conditions to the withdrawal of the first application.

31. Finally, I note that this application has been going on for a considerable period of time during which period the employees have not been able to be represented or seek alternative representation. It would be inappropriate to impose a discretionary bar in these circumstances and I decline to do so.

32. The application in Board File No. 2112-07-R is referred to the Registrar to be scheduled for hearing.

3449-07-U Dave Harris, Applicant v. Service Employees International Union, Local 1.on, Responding Party v. YWCA Hamilton, Intervenor

Duty of Fair Representation – Remedy – Unfair Labour Practice – The employer awarded a part-time Residential Counsellor position to the applicant H, who had less seniority than V – The collective agreement contained a job-posting clause requiring the employer to award the position to the more senior candidate where there was relative equality on a number of factors – The Union filed a grievance on V's behalf and entered into a settlement with the employer in which V was awarded the position filled by H – H made three allegations: first, the Union failed to properly communicate with him about the status of V's grievance; second, that it was clearly evident that he had better qualifications and experience and that seniority should not have been a factor; and finally, the union did not communicate properly with him after he learned of the settlement – On the second point, the Board found that there was no "rational pathway" that was evident between the facts, competing interests and the decision made by the union – The union did not undertake a proper investigation to determine whether V's grievance was worthy of pursuit, and therefore whether she should have been awarded the position because of her seniority – The Board found the union's approach was clearly not rational and called out for an explanation—which was not provided – Accordingly, on this point the Board found a violation of s. 74 – The Board was also concerned about the union's failure to advise H of his right to participate at the arbitration of V's grievance, but on the facts was not prepared

to make a finding of bad faith, or that it was so reckless as to constitute a violation – Declaration of a breach – Matter referred to Manager of Field Services

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Allison Gowling* and *Dave Harris* for the applicant; *Andrea Przybylo, Stacy Mitro* and *Tara Scott* for the responding party; *Rick Simmons* and *Tracey Helwig* for the intervenor.

DECISION OF THE BOARD: June 24, 2009

Introduction

1. This is an application brought before the Board pursuant to section 74 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended ("the Act"). The applicant asserts that the responding party ("the union") violated section 74 of the Act in its representation of him arising from his loss of position on or about January 2, 2008 resulting from the successful grievance of another employee in the bargaining unit.

2. The relevant facts for the purposes of this proceeding are set out immediately below.

Facts

3. The applicant ("Mr. Harris") was initially employed by the YWCA Hamilton ("the employer") as a Residential Counsellor, on a casual basis as a relief employee. On or about October 2, 2006, the employer posted a job opening for a Part Time Residential Counsellor, Night Sleep position. Both the applicant and another individual, Ms. Lorraine Virc ("Ms. Virc"), applied for the position. Both were provided interviews. At the time of the job posting, Mr. Harris had one-quarter year's seniority with the employer and Ms. Virc had two and three-quarter year's seniority with the employer.

4. The employer awarded the position to Mr. Harris on or about November 1, 2006. The collective agreement between the employer and the union contains a competitive job posting clause. The clause in question reads as follows:

> 19.06 The Employer and the Union recognize that job opportunity should usually increase to reflect the employee's qualifications, experience, ability, knowledge, attitude, ability to relate to the client groups, ability to work toward the goals and objectives of the client's individual program plan and training of the employee to do the job. Where the factors aforestated are relatively equal as between two or more employees applying for the same position, the Employer shall offer the position to the employee with the highest seniority.

Amongst other things, the job posting clause requires the employer to consider certain abilities, experiences and qualifications of the various candidates for a position. Where all of the relevant factors are relatively equal between candidates, the employer is to award the position to the more senior candidate.

5. As a result of the employer's decision to award the position to Mr. Harris, Ms. Virc asked the union to file a grievance on her behalf, asserting that she was equally qualified for the position but was the more senior candidate. On or about November 6, 2006, the union filed a grievance on behalf of Ms. Virc as a result of the outcome of the job posting competition.

6. The grievance made its way through the grievance process towards arbitration. In early November, 2007, approximately one year after the grievance was launched, Mr. Harris met with Tara Scott, the union's Chief Steward, at the employer's premises. Ms. Scott was relatively new in her role, and was not fully aware of the circumstances behind Ms. Virc's grievance. The union's business representative who was dealing with the grievance, Jeff Burch, had understood that Mr. Harris was concerned about losing his job with the employer. He indicated to Ms. Scott that she should communicate to Mr. Harris that he ought not to worry because he would always have a job with the employer, even if Ms. Virc were successful. As a result, Ms. Scott advised Mr. Harris that the grievor was "not going after his job". Mr. Harris understood this to mean that the union was going to attempt to settle Ms. Virc's grievance by way of a monetary payment, rather than by a resolution that would remove him from his position.

7. On or about November 22, 2007, Mr. Harris met with Stacy Mitro, a union representative, regarding the potential outcomes of the grievance filed by Ms. Virc. Ms. Mitro was also relatively new to her position, and was unaware of the circumstances behind the grievance in question. Ms. Mitro explained the grievance procedure to Mr. Harris and he was advised that if the grievance were successful his employment would not be terminated. That is, the same message that Ms. Scott had communicated to Mr. Harris in early November was reiterated to Mr. Harris by Ms. Mitro. Ms. Scott also repeated her understanding of the situation to Mr. Harris the next day, November 23, 2007. The impression left with Mr. Harris as a result of his interactions with Ms. Scott and Ms. Mitro was that his Night Sleep position with the employer was secure.

8. Mr. Harris states that he was never advised by either the union or the employer that he had a right to participate at the hearing of Ms. Virc's grievance. Neither Ms. Scott nor Ms. Mitro advised Mr. Harris that he had the right to participate at the arbitration hearing. No documentation was produced by the union to establish that written notice had ever been given to Mr. Harris of his right to participate at Ms. Virc's grievance arbitration hearing.

9. On or about December 1, 2007, Mr. Burch and Ms. Virc met with the employer in order to attempt to resolve her grievance. The employer advised Mr. Burch that it had selected Mr. Harris as the successful candidate because he possessed a Masters degree, whereas Ms. Virc did not. The union's position was that the Night Sleep position only required a Diploma in Social Work, and that the Masters degree was unnecessary. The parties were unsuccessful at effecting a settlement during this meeting. However, they achieved a resolution shortly thereafter, close to the date of the scheduled arbitration. The resolution of Ms. Virc's grievance was that she would be awarded the position then filled by Mr. Harris.

10. On or about December 12, 2007, the Supervisor of the employer's Community Support Program advised Mr. Harris that he had lost his position to Ms. Virc. Shortly thereafter, Ms. Scott contacted Mr. Harris and notified him that Ms. Virc's grievance had been successful, that he would be removed from the Night Sleep position and returned to his previous position, and that Ms. Virc would be placed into the Night Sleep position. Mr. Harris was returned to his previous position on or about January 2, 2008.

11. Mr. Harris spoke to Ms. Scott in early 2008 about the possibility of filing his own grievance regarding this result. Ms. Scott discouraged him from doing so. Mr. Harris asked the union for a copy of the collective agreement, and was advised by Ms. Scott that there was no current collective agreement in booklet form available at that time. The only available documentation was the previous 2005 collective agreement plus a Memorandum of Agreement that had been reached by the parties subsequently. An individual at the union's head office advised Mr. Harris that he could secure a copy of the relevant materials through the employer, because there is a copy of the collective agreement in each workplace to which the agreement applies. Mr. Harris ultimately obtained a copy of the collective agreement from the employer approximately two weeks later. The language contained in the relevant clause of the collective agreement, set out above in paragraph 4, had not changed from that contained in the 2005 agreement.

12. Neither Ms. Mitro nor Ms. Scott had any involvement on behalf of the union in determining whether Ms. Virc's grievance was worthy of pursuit – that is, whether the decision by the employer that resulted in Mr. Harris posting to the Night Sleep position complied with Article 19.06 of the collective agreement. Counsel for the union indicated at the consultation that Mr. Burch was responsible for making that determination. Mr. Burch did not attend at the consultation. However, counsel stated at the consultation that it was her understanding from Mr. Burch that Ms. Virc was the "more senior employee" and at the time of the job posting was "doing the job on the other shift". According to counsel, Mr. Burch considered the factors contained in Article 19.06 that related to the Night Sleep position in question, concluded that "the grievor was the senior person doing the job with the required qualifications", and therefore was the correct candidate for the position. Mr. Harris had earned a Masters degree in Religious Education that the union concluded was not required for this position.

13. At the time that the grievance was settled, Mr. Burch had in his possession all of the documentary information that the employer had regarding both the applicant and Ms. Virc at the time that it had made its initial decision regarding the job posting, including the curriculum vitae of both Ms. Virc and Mr. Harris. Mr. Harris advised at the consultation that Mr. Burch at no time contacted him to discuss his qualifications for the position.

Applicable Legal Principles

14. Section 74 of the Act provides as follows:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

15. The obligation to represent all employees in a bargaining unit in a manner consistent with the provisions of section 74 of the Act can at times impose a difficult burden upon trade unions. In the normal course of engaging in its day-to-day business a trade union will be faced with issues that require it to consider the competing interests of two or more bargaining unit members or groups of bargaining unit members. As noted by the Board in *Maria Mlakar*, [1989] OLRB Rep. December 1246, at paragraph 12:

> 12. ... Unions are often placed in the position of having to deal with competing rights and interests as between individual members of the bargaining unit for which they hold bargaining rights. Invariably there are situations where there is "discrimination" as between individuals.

Because bargaining agents are called upon to resolve issues of competing interests between its members on a regular basis, it is important that the merits of the decisions made by those bargaining agents to resolve those competing interests not be subject to routine second guessing by the Board. To this end, the decisions of the Board since the advent of the statutory duty of fair representation have established a high standard of review, reflecting the expectation of the Board that it ought not to be asked to rule upon the legality of every decision made by a union in the normal course of performing its business. In *Dufferin Aggregates*, [1982] OLRB Rep. January 35, the Board put it this way:

> 37. The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification.

Quite simply, decisions made by trade unions that involve the balancing of its members' interests within a bargaining unit are provided with a considerable amount of deference by the Board.

16. Not surprisingly, the resolution of disputes amongst bargaining unit members that involve the consideration of seniority, such as the instant proceeding, falls amongst those decisions of unions that have attracted the most controversy. In cases of that nature there are a number of different interests for the union to consider. When a dispute arises that raises the question of the interpretation of collective agreement language to a promotion opportunity or a layoff, the interests of the person or persons seeking that promotion, or seeking to avoid a layoff, must be carefully considered and balanced by the union. In addition, however, the interests of the employees in the bargaining unit as a whole may also be a factor that informs the union's decision-making in these circumstances.

17. In *North York General Hospital*, [1984] OLRB Rep. February 286, the Board noted that amongst the various factors that must be weighed by the union in making its decision in circumstances similar to those before the Board in this proceeding is the support that the bargaining unit member's position has on both the facts and the contractual language, as well as any detrimental reliance created by "a reasonable expectation of contractual language" and any past practice of the union that could add weight to an employee's claim. To avoid arbitrary behaviour, the Board concluded that a union official "must consider the relevant factors and engage in a "rational" process of decision-making". The Board also observed, at paragraph 22 of its decision, that legal restraint on the part of the Board is warranted when reviewing the decision-making of the union "because a trade union is better able than a labour relations board to reconcile competing job interests, to ration the limited capital of the grievance settlement process, and to allocate group funds".

18. One of the leading cases dealing with the application of section 74 of the Act in the context of balancing seniority considerations is *Savage Shoes Ltd.*, [1983] OLRB Rep. December 2067. In *Savage Shoes*, the complainant was laid off and returned to work four times within a one

year period. Each time she returned to work she was required to complete documentation reflecting that she was a new hire, and on probation. After the fourth return to work and layoff, the complainant reviewed the collective agreement and concluded that she had in fact maintained her seniority rights based on the language contained in the agreement. When she approached the local union president regarding the situation, he advised the complainant that the language in the collective agreement only applied to temporary layoffs. The local's president was of the view that the complainant's most recent layoff was permanent, and that the language contained in the collective agreement did not apply to her situation. The complainant was not satisfied with this response, asked the local union president for the name and telephone number of a business agent whose opinion the local union president had indicated he had relied upon, and was rebuffed. She subsequently filed a complaint against the union, alleging a violation of what was then section 68 of the Act, and is now section 74 of the Act.

19. In *Savage Shoes*, the Board described the duty of fair representation in the following passage:

> 35. In this context, an employee in a bargaining unit for which a trade union exercises exclusive bargaining rights has no reason to expect that his personal interests will always be fully served by the trade union. He does, however, have a legitimate expectation that choices made by the trade union, whether ultimately favourable or adverse to his personal interest, will at least be honest, fair and rationally responsive to interests and circumstances relevant to the decision. It is this employee interest to which section 68 is addressed.
>
> 36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.
>
> ...
>
> 38. With these thinking processes hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of the facts or of a collective agreement is found by the Board to be "reasonable" ... "not unreasonable" ... "not open to challenge" ... or at least "not implausible" ... then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers "patent" and arrives at an "almost perverse" understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from "directing its mind to the

> real question", and that in so doing it has acted in an arbitrary fashion .... Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.
>
> 39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 623, para. 30; *Swing Stage Ltd. re Alvin Plummer*, [1983] OLRB Nov. 1920.

The Board noted, at paragraph 40, that when determining whether the decision-making of a union official is arbitrary, the Board must be "sensitive to the context within which and the persons by whom such decisions are normally made", and, at paragraph 41, that the duty of fair representation "is, in the end, a duty which applies to the trade union as an institution. Its requirements cannot be avoided by delegating decision-making to someone incapable of travelling a rational pathway from relevant considerations to reasonable result".

20. In *Savage Shoes*, the complainant's claim was that her seniority rights had been ignored by her employer when it applied the layoff provisions of the collective agreement. The Board took note of the significance of seniority in collective bargaining and in the administration of the resulting collective agreement by the bargaining agent. The Board made the following observations at paragraph 46 of its decision:

> 46. In short, seniority rights have a special importance to trade unions and an often critical importance to the employees they represent. Arbitrators are quick to recognize this, and stand ready to protect such rights to every extent possible. A trade union may not lightly compromise the seniority rights of some to secure benefits for others. The employees it represents may fairly expect a trade union to resist any suggestion that the seniority rights they have won be abandoned, restructured or narrowly interpreted, particularly in the climate of uncertainty which prevails in hard times when lay-offs of significant numbers of employees have occurred or are projected.

21. The Board ultimately concluded that the union had violated what is now section 74 of the Act. The local union president had misunderstood the significance of the temporary layoff provisions of the *Employment Standards Act*, and had concluded that those provisions limited the rights available to employees under the collective agreement. The Board was unable to appreciate how the local union president could have reached that conclusion, because in the Board's view it ought to have seemed obvious, even to a layperson, that minimum standards legislation could not remove benefits earned by the union through collective bargaining. The local union president's persistence in holding to his interpretation, even when the complainant drew his attention to clauses in the collective agreement that contradicted his view, suggested that the local union president had "ignored either the Articles or the patent incongruity of his interpretation ... or , alternately, that he was influenced by some consideration not revealed by the evidence". The Board noted that in the absence of any suggestion that the union was required to accept such an interpretation as a result of prior conduct on its own part, the interpretation of the collective agreement adopted by the union had the potential of "substantially and adversely affecting the rights of a number of employees represented by the union".

In addition, the Board noted that the union did not assert that the rights of the complainant and those in similar positions to her had been "sacrificed for the greater good of the bargaining unit".

22. The Board has identified the importance of a union engaging in rational decision-making or travelling a "rational pathway" between the facts of a case and the various competing interests, on the one hand, and the result, on the other, in a number of its decisions. In *North York General Hospital*, cited above, the Board indicated that it expected those making the decision for the union to "consider the relevant factors and engage in a "rational" process of decision making". In *Dufferin Aggregates*, cited above, the Board stated, at paragraph 37, that the question to be asked by the Board is whether the union made a decision "that could reasonably be made in all of the circumstances", the word "reasonable" meaning "by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors".

23. In most cases a rational process of decision making requires a union to fully investigate the facts of the case. In *Savage Shoes*, the Board required the union to "seek out sources of further relevant information which should be taken into account" in making its decision. In *William Almas* (Board File No. 1059-80-U, unreported decision dated November 19, 1980, cited with approval in *Softley Cartage Limited*, [1982] OLRB Rep. May 766), the Board made the following observations:

> 9. Here, as with seniority grievances generally, the dispute included the competing interests of two employees in the bargaining unit. Obviously, the respondent could not support both ... The duty of fair representation in this situation requires the respondent to honestly turn its mind to the provisions of the collective agreement and the evidence available, and to press for the resolution which it objectively feels is in accordance with the collective agreement. ...

In *Joe Vetere*, 2003 CanLII 62948 (May 2, 2003), a decision of the British Columbia Labour Relations Board interpreting a statutory duty of fair representation provision contained in that province's *Labour Relations Code* that is identical in wording to section 74 of the Act, the B.C. Board stated the following regarding the need to investigate the facts in a job competition grievance (at paragraph 45):

> Third, I find the Union's treatment of Vetere throughout was arbitrary and that this also reinforces the notion that personal favouritism played a part in this matter. I find the fact that no one from the Union attempted to inform Vetere of the grievance and to consult with him until the settlement was a fait d'accompli to be most extraordinary in light of the fact that he was being removed from the position in question. Clearly Vetere had an important and conflicting interest at stake and as such, I find the Union should have taken more care and concern in considering his interests. At the very least the Union should have interviewed him at some point as part of its obligation to consider "the various relevant and conflicting considerations": *Rayonier, supra.*

In the decision referred to at the end of the above-referenced passage, *Rayonier Canada (B.C.) Ltd.*, [1975] 2 Can LRBR 196, the B.C. Board made the following comments regarding the duty of a union to not act in an arbitrary manner:

> ... Finally, a union cannot act in a perfunctory matter [sic]. Instead, it must take a reasonable view of the problems before it and arrive at a thoughtful judgment about what to do after considering the various relevant and conflicting considerations.

24. The Board's recognition in *Savage Shoes* that seniority rights have "special importance to trade unions" does not mean that a trade union can always make seniority the determining factor when resolving differences involving competing interests of bargaining unit members in the absence of collective agreement language establishing seniority as the determining factor. In *Richard Sevigny*, 2003 CanLII 38063 (December 9, 2003), the Board made the following observations when deciding a complaint brought by an individual against a trade union asserting that the union had improperly decided to not pursue his job posting grievance:

> 8. Seniority, although an important principle, particularly for trade unions, does not exist as an independent concept. Seniority is important in a collective agreement only to the extent that it plays a role in determining who is laid off, who gets to take vacations in premium time, and who is entitled to success in job competitions. Parties regularly negotiate the extent to which seniority will be a criterion in all those areas. Sometimes seniority is a determinant in vacation selection, sometimes not. In job competitions, skill and ability is generally as important as seniority. In layoffs, seniority may play a significant role, but it may be departmental, rather than plant-wide seniority, that matters. Much depends on the degree to which a union and an employer have agreed in their collective agreement that seniority will play a role.
>
> 9. I set this out to explain that a complaint that a trade union is not respecting seniority has no real meaning, divorced from the circumstances.
>
> 10. Moreover, it is not the Board's role to oversee collective bargaining arrangements to ensure that either the workplace parties are honouring principles of seniority or, more broadly, honouring their collective agreements. Employers and union [sic] enjoy considerable freedom to interpret and apply the collective agreement as they wish. If they disagree, then binding arbitration is available. However, if the union and the employer agree to particular interpretations or practices, there is no role for the Board to intervene and apply its own interpretation. A complaint of a breach of the duty of fair representation is not a means to permit the Board to interfere in the collective bargaining relationship between the employer and the union....
>
> 11. As set out in my earlier decision, for quite sensible reasons, the union decided not to pursue the applicant's grievance with respect to the employer's practice of deferring placing successful candidates in the position until a time convenient to the company. It appeared the union had long condoned that practice.

25. As noted by the Board in *Richard Sevigny*, in practice unions and employers have considerable latitude to interpret and apply the provisions of collective agreements that bind them. For a number of legitimate reasons, it is very common for employers and unions to adopt or to agree to understandings regarding the interpretation or application of collective agreement language that does not follow a literal reading of that language. In these situations, the Board will not intervene so as to alter the approach taken to the interpretation or application of the collective agreement by one or both of the parties. Acting in good faith, the parties to a collective agreement are free to adopt an approach to the interpretation or application of that collective agreement that "works for them" without fear that the Board will intervene.

26. A review of a decision of the Board that exhibits many similarities to the facts of this proceeding is helpful to illustrate the deference provided to unions where agreements or practices of this nature arise. In *Dixie Canada Inc.*, [1984] OLRB Rep. September 1179, the union chose to not proceed to arbitration with a grievance filed by a bargaining unit employee who asserted that his

qualifications for a vacant position were stronger than the individual who was awarded the position. The collective agreement contained a "competitive" job posting clause rather than a "threshold" clause, similar in nature to the one contained in the collective agreement in this proceeding. The union interpreted the clause to provide that when two employees were at the top rate of the relevant classification, seniority should be the governing factor. This had been adopted as the union's clear position regarding the interpretation of the collective agreement since negotiations three years earlier. The complainant had been on the union's negotiating committee during those negotiations and, as a member of the union's plant executive, had argued on a number of occasions subsequent to those negotiations for the application of the seniority provisions in a manner consistent with the union's application of those provisions to his own circumstances.

27. The complainant in *Dixie Canada* essentially made the same argument as Mr. Harris makes in this proceeding – that the union had not put its mind to his grievance and had adopted a predetermined position to support the "seniority" factor identified in the relevant collective agreement provision, ignoring the "ability and experience" factor. The Board rejected the complainant's argument. At paragraphs 35 and 36 of the decision, the Board made the following observations regarding the union's approach to the question of whether it ought to have pursued the complainant's grievance:

> 35. In the Board's view, the respondent did seriously consider the complainant's grievance in terms of assessing the impact proceeding to arbitration would have on the bargaining unit as a whole. In J. Elliott's words, the principle established in the Beamish-Neil grievance would have gone "out the window". That principle – that seniority should govern when two employees were both top-rated – had been union policy for some time and had been asserted by the union in several grievances. The Board accepts the evidence of J. Elliott in this regard, particularly since M. Palmer, the complainant's own witness, also testified that the company had fought the union on this point "about four times" before deciding to accept the union's position in the interpretation of article 15(4).
>
> 36. The Board also accepts the testimony of M. Palmer and J. Elliott that there was no verbal agreement between the parties to the collective agreement to "alter" the interpretation of article 15(4). The fact that the union proceeded to arbitration with two grievances in the cutting and creasing department (although the company settled the grievances before the arbitration hearing) supports this finding. However, the Board would stress that, on the reasoning in *Algoma Steel, supra*, which this Board affirms, there would have been nothing improper in the parties agreeing, verbally or otherwise, to interpret article 15(4) to mean, in effect, that top-rated employees are deemed to be of equal ability and experience so that seniority would govern.

Ultimately, the Board asked itself whether there was "a rational reason, a cogent labour relations reason for the union to drop the complainant's grievance, to opt for the seniority rights represented by [the successful candidate] as against the allegedly greater ability and experience of the complainant". The Board was of the view that the union made "a reasoned decision based on its view of the best interests of the bargaining unit as a whole", even in the context of seniority being identified by the Board as representing "a critical job interest". The Board concluded thusly:

> 44. ... Union support for seniority clauses – or the interpretation of seniority clauses in the direction of giving greater weight to seniority over other factors – is hardly novel. Moreover, it is not for this Board to second guess the union's choice provided

> the relevant factors and competing interests are considered. The union candidly characterized the other interest, i.e. ability and experience, as one which is generally supported (and sought after) by management. This assertion is also neither novel nor indicative of impropriety on the union's part. Thus, in light of all the evidence and submissions by the parties, and in view of the principles underlying the duty of fair representation, the Board finds that section 68 of the Act has not been violated.

Decision

28. In order to succeed in this complaint, Mr. Harris must satisfy the Board that the union has represented him in a manner that is arbitrary or discriminatory, or in a manner that reflects bad faith. Mr. Gowling, on behalf of Mr. Harris, conceded at the consultation that Mr. Harris was not asserting discrimination on the part of the union. Accordingly, the question before the Board is whether the actions of the union violated section 74 of the Act because they were arbitrary or constituted bad faith on its part.

29. As noted in a prior decision of the Board dated October 31, 2008, Mr. Harris essentially has three complaints regarding the representation provided to him by the union. First, he asserts that the union did not accurately communicate with him regarding the status of Ms. Virc's grievance while that grievance wound its way through the grievance procedure. In fact, Mr. Harris asserts that the union deliberately kept him in the dark regarding the grievance. Secondly, Mr. Harris asserts that it was clearly evident that he had better qualifications and more experience than Ms. Virc, and therefore that seniority ought never to have been a factor in determining who would be the successful candidate for the position. He states that the union focused only on seniority, did not turn its mind to the merits of the two candidates, and assumed that the candidate with the greater seniority ought to be awarded the position. Finally, Mr. Harris asserts that the union did not communicate properly with him after he learned that Ms. Virc had won her grievance and would be replacing him. Mr. Harris states that the union was evasive, would not accept his own grievance, and would not provide him with a copy of the collective agreement.

30. One of the three issues identified by Mr. Harris as constituting a violation of section 74 of the Act can be dealt with quickly. The assertion that the union failed to communicate with Mr. Harris after he had learned that he would be removed from his Night Sleep position, and would not provide him with a copy of the collective agreement, is not supported by the evidence. There is nothing before the Board to suggest that the union was evasive or failed to properly communicate with Mr. Harris after he learned that Ms. Virc would fill the Night Sleep position. It ought not to be surprising that Ms. Scott advised Mr. Harris that a grievance asserting that he should have successfully posted for the Night Sleep position was unlikely to succeed. Assuming that the union was of the view that its assessment of the strength of Ms. Virc's grievance was accurate, the union would have lost face and all credibility with the employer should it have accepted and pursued such a grievance on behalf of Mr. Harris in light of its earlier, successful efforts representing the interests of Ms. Virc. It is also evident that the union did not refuse to provide Mr. Harris with a copy of the collective agreement. The Board accepts the explanation provided by Ms. Scott – that it was just easier for the union to recommend to Mr. Harris that he review the collective agreement made available by the employer at the workplace. There was no suggestion made by Mr. Harris that he had made multiple attempts to seek a collective agreement from the union and had been rebuffed by the union each time he made those attempts.

31. The other two assertions made by Mr. Harris are not as easily resolved. As noted above, Mr. Harris asserts that the union did not properly apply the terms of Article 19.06 of the collective agreement to his situation, improperly focusing instead upon Ms. Virc's greater seniority. Article 19.06 of the collective agreement is a competitive clause that requires the employer to consider each candidate's qualifications, experience, ability, knowledge, attitude, ability to relate to client groups, ability to work towards the goals and objectives of the client's individual program plan, and training to perform the Night Sleep position (hereinafter "the collective agreement qualifications"). Only when an assessment of the collective agreement qualifications results in a determination that two or more candidates vying for a position are "relatively equal" does seniority become the tie-breaking factor.

32. The union's interpretation of Article 19.06 in the context of the Night Sleep vacancy could easily lead one to conclude that the provision was misapplied by the union. On the basis of the evidence before the Board, it is not difficult to reach the conclusion that the union considered Ms. Virc's greater seniority to be the critical factor that drove its decision making. As noted above, counsel for the union asserted during the consultation that the union considered the collective agreement qualifications contained in Article 19.06 that related to the Night Sleep position in question and concluded that "the grievor was the senior person doing the job with the required qualifications". The response filed by the union reflects that very same approach to the issue. The union's response states, at paragraph 11, that both Mr. Harris and Ms. Virc "had previously been working as Residential Counsellors on different shifts, and both had the requisite experience, qualifications and other abilities required for the position". It is clear that the union interpreted Article 19.06 of the collective agreement as if it were a "threshold" or "sufficient ability" clause, wherein a candidate that has the requisite threshold qualifications for a position will secure that position if he or she has the greatest seniority. That is not the nature of the clause that the parties negotiated in Article 19.06.

33. There is also some question as to whether the union properly represented Mr. Harris during the course of investigating and pursuing Ms. Virc's grievance. After Ms. Virc filed her grievance, the union had a decision to make. It could choose to pursue Ms. Virc's grievance against the employer, or it could choose to not pursue the grievance. In order to reach that decision, the union was required to review the terms of Article 19.06 of the collective agreement, review the substance of the job posting for the Night Sleep position, assess whether the stated qualifications for the Night Sleep position were relevant for the role, consider the various collective agreement qualifications identified in Article 19.06 to the extent that they were relevant to the Night Sleep position, and assess those collective agreement qualifications in relation to both Ms. Virc and Mr. Harris. If it were determined as a result of this process that the employer ought to have provided Ms. Virc with the opportunity to fill the Night Sleep position, the union would choose to pursue the grievance on behalf of Ms. Virc.

34. On the basis of the materials before the Board, it is unclear how the union went about assessing the relative collective agreement qualifications of Ms. Virc and Mr. Harris, and therefore the basis upon which the union concluded that their collective agreement qualifications were "relatively equal". There appears to be no dispute that Mr. Burch had in his possession the curriculum vitae of Ms. Virc and Mr. Harris, and that Mr. Burch was in touch with Ms. Virc regarding the grievance and had access to information regarding her collective agreement qualifications for the position. But there is nothing before the Board to suggest that Mr. Burch ever spoke with (or even tried to get in touch with) Mr. Harris regarding his collective agreement qualifications for the Night Sleep position. Mr. Harris advised the Board at the consultation that

much of what he had learned during the completion of his Masters degree in Religious Education provided him with collective agreement qualifications relevant to the Night Sleep position. Counsel for the union advised the Board during the consultation that the union was of the view that the Masters degree held by Mr. Harris "was not a requirement for this job".

35. It may well be that a Masters degree itself was not a requirement for the Night Sleep role. However, Mr. Harris asserts that the underlying skills that he developed during the course of completing his Masters degree enhanced his collective agreement qualifications for the Night Sleep position. Mr. Burch did not contact Mr. Harris at all regarding his collective agreement qualifications, and thus did not attempt to inform himself of the level or quality of collective agreement qualifications held by Mr. Harris. As a result, it is not evident how Mr. Burch could have ever fairly reached the conclusion that the collective agreement qualifications held by Ms. Virc for the Night Sleep position were "relatively equal" to those held by Mr. Harris. In that regard, it is critical to note that the union did not take the position in this proceeding that Ms. Virc's collective agreement qualifications were greater than those held by Mr. Harris, such that her level of seniority was not a factor. It is clear from the union's written response and counsel's submissions at the consultation that the union considered Ms. Virc's seniority to be the determining factor. Article 19.06 of the collective agreement only makes seniority the determining factor if the collective agreement qualifications held by Ms. Virc and Mr. Harris are "relatively equal". For the reasons outlined above, the evidence does not establish any basis upon which Mr. Burch could have reached a determination regarding the relative equality of the collective agreement qualifications held by Ms. Virc and Mr. Harris.

36. There was a certain amount of miscommunication between the union and Mr. Harris during the course of Ms. Virc's grievance process. Counsel for the union conceded at the consultation that the impression left with Mr. Harris that the union was only seeking a financial remedy for Ms. Virc, and that his Night Sleep position was secure, was an unfortunate result of two relatively new union representatives communicating verbatim to Mr. Harris a message given to them by Mr. Burch. This is the type of innocent miscommunication that occurs from time-to-time between a trade union and its members, and is not the type of conduct that attracts liability under section 74 of the Act.

37. That said, there exists a broader concern regarding the level of communication between the union and Mr. Harris during the course of Ms. Virc's grievance. Whether as a result of transitioning work between union representatives or otherwise, the union was not sufficiently communicative with Mr. Harris during the course of Ms. Virc's grievance process. Counsel for the union asserted during the consultation that the union had satisfied its obligations to communicate with Mr. Harris because he was advised of the grievance filed by Ms. Virc, met with union representatives regarding the grievance during the grievance process, and was advised of the result of the grievance once it was resolved.

38. But that fulfills only a portion of the union's responsibilities. Notwithstanding that under the Act bargaining unit employees of the employer are not represented individually, but collectively through the agency of the union, as a matter of natural justice individual employees are entitled, in certain circumstances, to notice of a grievance hearing and the right to participate in that hearing. Since the Ontario Court of Appeal decision in *Bradley v. Ottawa Professional Fire Fighters Association* (1967), 63 D.L.R. (2d) 376, it has been clear that a bargaining unit member such as Mr. Harris, whose position is at risk because of another bargaining unit member's job posting grievance,

has the right to notice of the grievance arb tration hearing and a right to participate in the arbitration of the grievance. This is almost certainly the case where the job posting provision is in the nature of a competition clause, such as the one in the collective agreement in question (see, for example, *John Noble Home*, (1994) 39 L.A.C. (4th) 324 (Mitchnick)). The obligation to provide notice to the affected employee is one that is equally held by the employer and the union. As noted above, there is nothing before the Board to suggest that Mr. Harris was ever advised by the union (or, for that matter, by the employer) of his right to participate at Ms. Virc's grievance arbitration hearing. Mr. Harris states that he was never advised of his right to participate by anyone in the union, the union did not produce any document at or before the hearing to suggest that it had advised Mr. Harris of his right to participate.

39. Has the union violated section 74 of the Act? In my view, it has.

40. As noted by the Board in *Kenneth Edward Homer*, [1993] OLRB Rep. May 433, a trade union has a kind of 'right to be wrong' in how it exercises its judgment in matters such as that before the Board. Errors such as the impression left with Mr. Harris by Ms. Mitro and Ms. Scott as a result of their comments in November, 2007 easily fall within this concept. Mr. Burch appears to have misunderstood the real concern of Mr. Harris, and based upon that misunderstanding advised Ms. Scott and Ms. Mitro to communicate a certain message to Mr. Harris that resulted in a misapprehension by Mr. Harris regarding his situation. That error falls well within the concepts of "honest mistakes" and "innocent misunderstandings".

41. But the other conduct complained of by Mr. Harris is more difficult to fit within this appropriately deferential framework. As noted above, when making decisions such as those made by the union in this proceeding, the Board expects a trade union to engage in rational decision making, such that a "rational pathway" is evident between the facts and the competing interests, on the one hand, and the decision made, on the other. The union is required to consider all relevant factors and engage in a process of decision making characterized by "the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors" (see *Dufferin Aggregates*, cited above). In the situation facing the union as a result of Ms. Virc's grievance, a rational process of decision making required Mr. Burch (or a designate) to fully investigate the facts of the case, which included interviewing Mr. Harris in order to seek to understand the extent of his collective agreement qualifications for the Night Sleep position. There is, of course, the possibility that Mr. Harris may have perceived that his position and the position taken by the union were potentially at odds, and that he may not have been prepared to co-operate with Mr. Burch. In those circumstances, any obligation owed to Mr. Harris by the union flowing from its obligation to seek information from Mr. Harris would be discharged by the union by simply seeking to meet or to speak with him.

42. Based on all of the evidence before me, and the submissions of counsel, there is no "rational pathway" that is evident between the facts, competing interests and the decision made by the union. Mr. Burch, on behalf of the union, merely determined to pursue the grievance launched by Ms. Virc because she was the most senior candidate seeking the position and had been performing the job on another shift. That is how the union's thinking was reflected by its formal response to Mr. Harris' application, and that is how the union's thinking was described by counsel at the consultation.

43. The interpretation of Article 19.06 of the collective agreement adopted by the union is clearly at odds with the plain meaning of the words contained in the collective agreement. The

wording of the first sentence of Article 19.06 is ambiguous, in that it provides only that job opportunity should "usually" increase to reflect the collective agreement qualifications of the various candidates. The union might have argued that it adopted the position that Ms. Virc ought to have successfully filled the Night Sleep position because her case was an exception to the "usual" situation. However, the union did not argue in its response or at the consultation that its position was justified on the basis of the use of the word "usually" in Article 19.06. Similarly, the union did not argue that Article 19.06 is so ambiguous that it could adopt the interpretation of the clause that it did. In addition, and as noted above, the union agreed that Ms. Virc's seniority was taken into account when it determined to pursue her grievance. If so, by the very terms of Article 19.06 the union must have reached the conclusion that the collective agreement factors were "relatively equal", and therefore that seniority had relevance.

44. In the circumstances of this proceeding, can the union assert within the confines of section 74 of the Act that it was entitled to treat Article 19.06 of the collective agreement as a "threshold" clause rather than a "competition" clause, notwithstanding the wording of that provision? As noted above, the Board's jurisprudence suggests that it could be entitled to do so, but not in all circumstances. At the risk of appearing repetitive, the union is within its right to take such an approach to Article 19.06 if it can establish a "rational pathway" between the interests being balanced and the result that was reached. In *Dixie Canada*, for example, the trade union established that it had consistently challenged an employer's interpretation of a similar collective agreement provision in an attempt to make seniority the determining factor when both candidates had reached the top dollar rate. The employer eventually conceded the position taken by the union. The union justified its adoption of that approach in a subsequent case by noting that altering its position would result in it losing the principle that it had taken great pains to have established. As the Board noted in that proceeding, the trade union had established a rational labour relations reason for the approach it adopted.

45. In this proceeding, the union has not established any rational labour relations reason for adopting the position it did with respect to the grievance filed by Ms. Virc. There is no evidence before the Board to suggest that the union's focus on Ms. Virc's seniority as the deciding factor in its decision making is anything but an individual response to Ms. Virc's particular grievance. There is no evidence before the Board to suggest that the union was attempting to systematically move the employer towards an interpretation of Article 19.06 consistent with the position that a candidate's seniority ought to be a more significant factor, such as was before the Board in *Dixie Canada*. As noted by the Board in *Richard Sevigny*, cited above, the significance of seniority in any given collective bargaining relationship "depends on the degree to which a union and an employer have agreed in their collective agreement that seniority will play a role". Based on the current wording of Article 19.06, seniority does not serve a particularly significant role in the context of determining who will be successful in securing posted job opportunities with the employer – in fact, in the absence of relatively equal collective agreement qualifications, Article 19.06 of the collective agreement dictates that seniority has no role – it is an irrelevant consideration.

46. Some of the collective agreement qualifications contained in Article 19.06 could be extremely difficult for the union to assess. For example, it is not entirely clear how the union would be able to assess as between two or more candidates the candidate that possessed the best "ability to relate to client groups" or the ability "to work towards the goals and objectives of the client's individual program plan". The union did not, however, assert at any time in its response or at the consultation that it had made the best assessment it could of the collective agreement factors and concluded that the factors as between Ms. Virc and Mr. Harris were relatively equal. Mr. Burch did

not contact Mr. Harris at all about the latter's collective agreement qualifications for the Night Sleep position. As a result, no one on behalf of the union undertook a proper investigation to determine whether Ms. Virc's grievance was worthy of pursuit, and there is no apparent factual support for the conclusion that the union must have reached - namely that Mr. Harris and Ms. Virc enjoyed "relatively equal" collective agreement qualifications, and therefore that Ms. Virc ought to have been initially awarded the position by the employer because of her greater seniority. Although it was undoubtedly the role of the employer to determine which of the two candidates would fill the Night Sleep vacancy based on its assessment of the candidates' collective agreement qualifications, the union cannot merely blindly reject or accept that assessment. At the very least it must make efforts to gather the information required to make its own assessment, and then assess the situation itself.

47. Based upon the lack of any legitimate basis consistent with the wording contained in the collective agreement for the conclusion that Ms. Virc ought to have been the successful candidate for the Night Sleep position, the only result that can be reasonably reached in the circumstances is that the union sought to secure the Night Sleep position for Ms. Virc for the sole reason that her seniority was greater than that enjoyed by Mr. Harris, without regard to a proper consideration of the collective agreement qualifications of both Mr. Harris and Ms. Virc. Seniority in the circumstances was an irrelevant consideration. The approach taken by the union was clearly not rational and called out for an explanation. No such explanation was provided. In these circumstances, I conclude that the union has violated section 74 of the Act.

48. The failure by the union to advise Mr. Harris of his right to participate at the arbitration of the grievance filed by Ms. Virc is potentially problematic. I am not prepared to conclude that the union did not want Mr. Harris to participate and therefore consciously excluded him from that process, as Mr. Harris asserted during the consultation. However, the union erred in its decision making by failing to provide Mr. Harris with notice of his right to participate at the arbitration of the grievance filed by Ms. Virc. The question raised is whether the failure to do so reflected arbitrary behaviour or bad faith towards Mr. Harris.

49. The evidence does not establish bad faith on the part of the union. I am also of the view that the error made by the union in this regard does not constitute arbitrary behaviour for the purpose of section 74 of the Act. I reach this latter conclusion with some hesitation, because in light of the longstanding, well-established legal principle established by *Bradley*, cited above, one can argue that the failure by the union to provide notice of the hearing to Mr. Harris can only be characterized as constituting a violation of section 74 of the Act. At least one arbitrator agrees. In *Re Corporation of the City of Ottawa*, (1993), 34 L.A.C. (4th) 170, Arbitrator Jamieson made the following observations at page 176:

> Before leaving this topic, I feel compelled to raise another related aspect of the over-all scheme of the *Labour Relations Act* which does not seem to have been touched on in any of the decisions referred to, nor was it raised or argued by the parties in this case. This is the possible linkage between the lack of union representation by the exclusive bargaining agent in these situations and the duty of fair representation which is imposed on trade unions under s. 69 of the *Labour Relations Act*. It seems to me that under this duty of fair representation, there has to be some responsibility on bargaining agents to ensure that employees who are caught in the middle like the Incumbent here, are not only made aware of any arbitration proceeding that may *directly* adversely affect their recently won promotion, but also that they are given a full explanation as to why the bargaining agent decided in the first place to represent

> others in the bargaining unit as opposed to them and why it is necessarily taking a position that is adverse to their interests. While I have no intention of being definitive in this regard without the benefit of input or argument by the parties, it is interesting to note that even back in 1967, when the concept of a statutory duty of fair representation was only in its infancy in Canada, the court hinted in *Bradley* (at p. 383), that there may well be a responsibility on a bargaining agent to inform recently promoted employees that their promotions were being challenged in arbitration proceedings. Today, a quarter of a century later, I would surmise that anything less than what I have proposed by way or notice and entitlement to be informed would not, in all likelihood, meet the minimum standards of representation which have been developed over the years by the Ontario Labour Relations Board.

These observations were clearly *obiter* and not essential to the award he made in that proceeding.

50. Other views, however, do exist. In *Maria Mlakar*, cited above, the Board made the following comments about this question at paragraph 18 of its decision:

> Counsel for the complainant argued that the union had added to the complainant's confusion and had acted inappropriately by not providing the complainant with the notice and information contained in the employer's letter of February 14, 1989. The requirement of notice to an incumbent on a job posting grievance in the arbitral jurisprudence has developed from the decision in *Re Hoogendorn and Greening Metal Products Screening Equipment Co. et al.*, [1968] S.C.R. 30. The concern is that an incumbent employee be made aware of the fact that her position may be in jeopardy depending upon the outcome of the arbitration and her consequent right to participate in the arbitration. There is no requirement that such notice come from the union. It is simply that notice must be given. Ms. Jewitt testified that the union's practice was to rely on the employer to provide notice to affected employees. ... Both the union and the employer are aware that absent notice to affected employees the arbitration hearing will not proceed but will be adjourned in order that notice be given. It is in both their interests that notice be provided in order to avoid the delay and expense arising from such an adjournment. The union and the employer here have worked out an arrangement that seeks to ensure that proper notice will be given to all those entitled to it. The union cannot be faulted for that.

51. In the circumstances before me, I am not prepared to conclude that the union's failure to provide Mr. Harris with notice of his right to participate at the arbitration of the grievance filed by Ms. Virc was so reckless that it violated the provisions of section 74 of the Act. The evidence before the Board simply reflects that the union neglected to provide that notice to Mr. Harris, an error that is not unknown in the world of grievance arbitration. On the evidence before the Board, I do not believe that I can fairly conclude that the union's failure to act in this respect brought it to the point that it violated section 74 of the Act.

52. However, for the reasons outlined above, in my view the overall approach taken by the union towards Mr. Harris' interests resulting from the grievance filed by Ms. Virc clearly constitutes a violation of section 74 of the Act.

Remedy

53. During the course of the consultation the parties addressed the question of what relief ought to issue should it be determined that the union violated section 74 of the Act.

54. In the circumstances of this proceeding (in particular, the passage of time since the employer's initial decision to award the Night Sleep position to Mr. Harris), it appears to me that it may well be in the best interests of all parties that a mutually acceptable resolution of this proceeding be negotiated amongst the parties themselves. To that end, this proceeding is referred to the Manager of Field Services, who is authorized on his own accord (or through a Labour Relations Officer that he may appoint) to endeavour to effect a resolution of this proceeding.

55. In the event that the parties are not able to agree upon such a resolution, I will remain seized of the issue of remedy.

3729-08-R Labourers International Union of North America, Ontario Provincial District Council, Applicant v. Manorcore Group Inc., **Manorcore Construction Inc.** and Manorcore Holdings Inc., Responding Parties

Certification – Construction Industry – Practice and Procedure – Related employer – The employer filed its response to the union's challenges, but failed to deliver it to the union, in accordance with the Board's standard direction – The union asserted the employer had accepted the union's position and sought certification – The Board noted that the direction was not required by the Act or its Rules; that there was no consequence set out for a failure to deliver; and that the purpose of the direction was to facilitate discussion between the parties and to prevent gerrymandering the list – Finally, the Board found there was no prejudice to the union – The Board found there was no proper basis to refuse to permit the employer from maintaining their objection to the union's challenges – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD: June 12, 2009

1. The Board, by decision dated March 31, 2009 in this application for certification being dealt with under section 128.1 of the *Labour Relations Act, 1995*, S. O. 1995, c. 1 as am. (the "Act") determined the description of the appropriate bargaining unit and noted it was unable to determine the percentage of employees in the bargaining unit who were members of the applicant on the date the application was filed. As a result, the application was referred to the Manager of Field Services to conduct a Regional Certification Meeting.

2. The Board in that March 31st decision also made the following direction:

> The Board directs the applicant to deliver to the responding party and file with the Board its challenges (including any additions) to the Schedule A (list of employees) filed by the responding party no later than five (5) days from the date of this decision. The Board also directs the responding party to deliver to the

> applicant and file with the Board its position in reply to each of the applicant's challenges (including any additions the applicant proposed) within ten (10) days of the date of this decision. The parties are required to provide the reasons for each of their challenges following the Regional Certification Meeting in accordance with Information Bulletin No. 9: Status Disputes in Certification Applications in the Construction Industry

The applicant, by letter dated April 2nd challenged fourteen of the fifteen persons the responding parties had listed as being the employees of Manorcore Construction Inc. ("Manorcore Construction"). The applicant also sought to add three persons to the list: Jermiah Climson, Darrick Harris and Gerry Smith.

3. The responding parties, in their response, had asserted Manorcore Construction was the only responding party that employed construction labourers. The responding parties in their response stated that Manorcore Group Inc. ("Manorcore Group") is a general contractor while Manorcore Holdings Inc. ("Manorcore Holdings") is a holding company and neither of them employed construction employees.

4. The responding parties by letter dated April 13th filed with the Board, maintained their position that all 15 persons listed in their response were employees at work in the bargaining unit. They also asserted that the three persons the applicant sought to add to the list were not employed by any of the responding parties, were not engaged in bargaining unit work on the application date, and that one or both of Messrs. Harris and Smith had not been authorized by the responding parties to do any work on that date.

5. The responding parties' April 13th letter was not copied to the applicant. The responding parties assert their failure to provide that April 13th letter to the applicant was an inadvertent error that only came to their attention when the applicant asserted they were not entitled to oppose its challenges to the list.

6. The parties attended at the Regional Certification Meeting and filed their submissions in accordance with Information Bulletin No. 9. The applicant in its submissions asserted the responding parties should be precluded from objecting to the applicant's position as set out in its April 2nd letter on the grounds that the responding parties had not complied with the Board's direction contained in its March 31st decision. The applicant contends it only learned that the responding parties were objecting to its challenges when the parties met at the Regional Certification Meeting. The applicant asserts it has been prejudiced by the responding parties' failure to respond to the applicant's challenges because it believed the responding parties, by not replying, had accepted the applicant's position on the challenges and therefore did not investigate who was doing what work at the job sites listed by the responding parties in their response.

7. The Board's direction to the applicant to list its challenges, including additions, to the list of employees filed by the responding party and to the responding party to state its position in reply to the applicant's challenges does not set out what consequences might result from their failure to comply with that direction. As the responding parties pointed out in their submissions: "This requirement to file challenges is not contained in the Act or Rules. Nor is there any consequence stated in the Rules (or in the Board's order) for the failure to deliver the reply to the challenges in a timely manner."

8. The purpose behind requiring both the applicant and responding party well before the Regional Certification Meeting to set out their positions (but not the reasons for their positions) in respect of the employee list is to facilitate the parties' discussions at that meeting and to prevent "gerrymandering" of the list. Once a responding party learns who the applicant challenges, the Board would not normally permit it to subsequently challenge an individual on the list it had filed with its response. See, for example *Nathan Reid Homes Ltd.*, decision dated October 10, 2008, Board File No. 1439-08-R, unreported, 2008 CanLII 56632 at paragraph 20 where the Board wrote:

> If the responding parties desired to pursue the question of whether these three individuals were truly its employees on the application filing date but were constrained by the limited statutory two day response time, they ought to have stated clearly in their response that the names of the three individuals had been included on the Schedule "A" list out of an abundance of caution, and that they desired to maintain the alternative argument that the three individuals were not their employees. Most importantly, once the applicant disclosed at the Regional Certification Meeting who it asserted should be on the list of employees, it was too late for the responding party to assert this alternative position.

Thus, it is in the applicant's interest to identify and notify a responding party of its challenges to the list promptly.

9. There was nothing in the Board's direction to suggest the responding parties, by failing to deliver their reply to the applicant's challenges, are agreeing with the position taken by the applicant.

10. Moreover, I accept the responding parties' argument that the applicant cannot have been prejudiced by reason of their failure to deliver a timely reply to the applicant's challenges. The responding parties had filed a response to the application for certification within the time prescribed by the Board's Rules and provided the requisite information in accordance with section 128.1(3) of the Act. In that response, they listed the projects where Manorcore Construction's employees were working and set out the names of the employees who they say were at work in the bargaining unit on the application date. On receipt of the response, the applicant knew the position the responding parties were taking and were in a position to investigate the matter. The applicant also knew that the persons it believed were employed by the responding parties but who were not on the list of employees provided to the Board and filed with the response were people the responding parties would likely contend were not their employees. That is, the reply the responding parties were to provide to the applicant in accordance with the Board's direction would not require the applicant to undertake any further investigation. At best, the applicant would have learned whether the responding parties agreed with any of its challenges. The responding parties did not raise any challenges of which the applicant was unaware.

11. The Board in *Front Construction Industries Inc.*, decision dated May 1, 2009, Board File No. 3566-08-R, unreported, 2009 CanLII 22381 refused to issue a certificate on the basis of the status submissions filed by the union when the employer had not filed status submissions in accordance with Information Bulletin No. 9. The Board wrote at paragraphs 7 and 8:

> 7. The Board pursuant to sections 110(18) and 110(20) of the Act and Rule 41.3 may determine the issues in dispute in a construction industry certification application without a hearing following the Regional Certification Meeting based on the Officer's Report which is reviewed with and normally signed by the

parties at the conclusion of that meeting before it is submitted to the Board, the material filed previously by the parties, and the parties' submissions, if any, filed after the Regional Certification Meeting. The first paragraph of Section III (a) of Information Bulletin No. 9 provides:

> After the Regional Certification Meeting, the Board Officer reports to the Board. The Board may decide the remaining issues on the basis of the written material (including the submissions described in paragraph (b) below), or may schedule the application for hearing.

The failure of a party to file timely submissions after the Regional Certification Meeting does not compel the Board to reject that party's position as set out in the Officer's Report. Of course, a party that fails to file submissions within the time required by Information Bulletin No. 9 risks having the Board determine the issues in dispute based on the material filed prior to the Regional Certification Meeting, the Officer's Report and the submissions of the other parties.

8. In this case, the parties' positions were clear to each other. The applicant was not prejudiced by the submissions filed by the responding party several days beyond the time specified in Information Bulletin No. 9. The responding party did not in its submissions appear to raise any new issues or seek to make additional challenges.

That same reasoning applies to this situation. While the responding parties did not deliver their reply to the applicant's challenges in accordance with the Board's direction, their failure to do so did not prejudice the applicant. The responding parties at the Regional Certification Meeting maintained their position with respect to the list they filed with their response. There is, in my view, no proper basis for the Board to find the responding parties' failure to provide a reply to the applicant's challenges in accordance with the Board's direction resulted in the responding parties acceding to the applicant's challenges. The Board therefore dismisses the applicant's request to refuse to permit the responding parties to maintain their objection to the applicant's challenges.

12. The responding parties submitted the applicant had failed to provide any material facts on which it intended to rely to support its challenges to the list and argued the Board should therefore refuse to entertain the applicant's challenges. On the same day the responding parties filed their request to have the applicant's challenges dismissed, the applicant filed further particulars. The particulars provided by the applicant are, in my view, adequate. Thus, the responding parties' request to dismiss the applicant's challenges is dismissed.

13. The responding parties are aware the applicant claims no construction work was taking place on the application date at all but one of the job sites listed by the responding parties. The applicant also provided additional factual assertions in support of its challenges with respect to the work performed on the application date. It claims that only four persons were engaged in bargaining unit work on that date at one active job site: Mike Schnarr, Jeremiah Climson, Darrick Harris and Gerry Smith. It says all the other persons listed by the responding parties were not engaged on the application date in work normally performed by construction labourers and were not employees within the meaning of the Act because they exercise managerial functions. In particular, the applicant asserts Robert Adair is an office employee, Brent Patterson assists the Project Manager, Dan Heslinga is a carpenter, Rene Papineau is a machine operator and Norman Soldera is a site superintendent.

14. The responding parties assert that Messrs. Climson, Harris and Smith were not their employees but rather were employees of Labour Ready. The responding parties also assert those three persons did not do the work of a construction labourer for the majority of the day, and, in any event, Mr. Harris had not been authorized to do any work at the responding parties' project.

15. The applicant asserts all three responding parties are one employer for purposes of the Act and are the employer for purposes of this application. The responding parties assert the employer of the employees the applicant seeks to represent is Manorcore Construction. They also submit the applicant ought to file an application seeking relief under section 1(4) of the Act if it wishes to maintain its position that the three responding parties are one employer, and that in the absence of a section 1(4), the application ought to be dismissed, at least as against Manorcore Group and Manorcore Holdings.

16. The responding parties' request to require the applicant to file an application under section 1(4) of the Act before the Board can determine whether the three responding parties are one employer in relation to this application is dismissed.

17. In my view, it is unnecessary for the applicant to file a discrete application under section 1(4) of the Act before the Board can treat the three responding parties as one employer in the context of this proceeding. Section 1(4) of the Act provides:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Section 1(4) of the Act permits the Board to "treat the corporations" as one employer and grant relief "by way of declaration or otherwise" if the responding parties carry on associated or related activities or businesses under common control or direction. Provided the responding parties have adequate notice of the relief sought, there is nothing to prevent the Board from relying on any relevant section of the Act when dealing with an application for certification or any other application made under the Act. To accede to the responding parties' request would, in my view, give priority to technical form while ignoring the substance of the matter.

18. The Board in *Reids Uptown Homes*, [2007] OLRB May/June 633 (May 16, 2007) pointed out that in the construction industry, it is quite common for employers to use multiple names and multiple corporate entities to carry on various facets of their business. As the Board noted at page 635: "In the construction industry, the use of multiple names and multiple corporate entities is commonplace in the extreme." The Board in *Reids Uptown Homes* rejected the approach taken by the Board in two earlier decisions to dismiss certification applications when the union seeking certification named two or more entities as the responding party. The Board wrote at pages 635-36:

> Neither Monte Vista Contracting Inc., supra, [[1998] OLRB Rep. Sept./Oct. 847, reconsideration denied at Monte Vista Contracting Inc. Scrivens Essential Services Inc. [1998] OLRD No. 3738] and Merton Residences Corp. [. nor

> Merton Residences Corp., supra, [[1998] OLRD No. 1211] has had any lasting impact on the Board's case law. In decisions that did not refer to either decision, the Board has found no reason to dismiss an application that names more than one legal entity as responding parties: …
>
> The two decisions relied on by the responding parties have not been followed by the Board, are perhaps distinguishable, and in any event, with all due respect, not persuasive. First, in this case the applicant specifically indicated in the application that it relied on the provisions of subsection 1(4) and undertook to file a separate application if one was required. That was sufficient reason for the Board in Knight Electrical Contractors Ltd. [2005] OLRD No. 610 to decline to follow the cases cited by the responding parties. Even if the applicant had not raised the issue of subsection 1(4), the naming of three entities in the application is an implicit request to the Board to apply subsection 1(4).
>
> Neither Monte Vista Contracting Inc., supra, nor Merton Residences Corp., supra, refers to any other decision of the Board, nor to a decision of the Divisional Court in *Re Canac Shock Absorbers Ltd. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America Local 984, et al.* (1973) 34 D.L.R. (3d) 644.

The Divisional Court in *Canac Shock Absorbers Ltd.*, [1973] 2 O.R. 596; 34 D.L.R. (3d) 644 held the Board acted properly when it considered whether it would grant relief under section 1(4) of the Act despite no specific application being filed for relief under that section. The application had been made seeking declaratory and other relief under what is now section 69 of the Act. At page 647 (D.L.R.) the Divisional Court stated:

> It seems to be a very narrow approach indeed to an application before the Labour Relations Board to say in effect that the Board members have to wear blinkers, and limit their inquiry and tunnel their approach to exclude the important matters raised in the very application before them. It is our opinion, therefore, that the inquiry which the Board was prepared to enter upon was one within the scope of the Board's jurisdiction and, indeed, within the scope of its exclusive jurisdiction to determine its own proceedings, which has been so frequently recognized by the Courts as to require no authority at this time. The Court must not lose sight of what my brother Hughes describes as a "resounding privative clause", s. 97 [now section 116], whereby all questions that fall to be determined on similar applications are remitted to the Board whose determination is immune from judicial review, except in circumstances not present here.

See also *Genaire Ltd.* v. *International Association of Machinists*, [1958] O.R. 637; 58 CLLC ¶15,388; (appeal dismissed 58 CLLC ¶15,416) where McRuer, C.J.H.C wrote at page 876 (CLLC):

> It is argued by Mr. Dubin, counsel for the board, that the applicant is strictly confined to seeking within the provisions of ss. 41-44 of the Labour Relations Act a right to make the application in its present form. With this argument I cannot agree. I do not think the procedure before the board should be so formal that if an applicant makes an application for relief that he ought not to be granted the relief to which he is entitled because of some technical formality in the framing of the application. In this case I think in substance the application can be considered an application to the board to revoke its former order and, that being

> true, the board should exercise any jurisdiction given to it under the Act notwithstanding that a particular section of the Act is referred to in the formal application.

19. In this proceeding all parties agree, at the very least, that Manorcore Construction is an employer of the affected employees. Whether the other two responding parties should also be treated as the employer can be dealt with, if necessary, when the Board determines whether the applicant is entitled to be certified.

20. The applicant challenged 14 of the 15 persons listed by the responding parties in their response. The parties agree Mr. Schnarr was an employee in the bargaining unit on the application date. The responding parties challenged the three persons the applicant sought to add to the list: Messrs. Climson, Harris and Smith.

21. The Board therefore refers this application to the Registrar to be listed for hearing for the purpose of determining whether the 14 persons challenged by the applicant and the three persons challenged by the responding parties were employees at work in the bargaining unit on the application date and whether all the responding parties or only Manorcore Construction was the employer of the employees the applicant seeks to represent.

22. Unless the parties otherwise agree, it appears to me the parties should be prepared when the hearing convenes to deal first with whether Messrs. Climson, Harris and Smith were employed by at least Manorcore Construction and were doing the work of the bargaining unit on the application date. The parties and the panel of the Board assigned to hear this application can then determine how to deal with the balance of the status disputes and, if necessary, whether the employer of the employees the applicant seeks to represent is Manorcore Construction, all the responding parties, or in the case of Messrs. Climson, Harris and Smith, Labour Ready.

23. This panel of the Board is not seized with this matter.

0412-09-M Teamsters Local Union No. 419, Applicant v. **Millard Refrigerated Services, Inc.**, Responding Party

Certification – Discharge for union activity – Interim Relief – Unfair Labour Practice – The union, having lost a representation vote, receiving far fewer votes than the membership support it appeared to have on application, sought remedial certification under s. 11, ULP remedies, interim reinstatement of an organizer and an interim declaration that the employer revert to its past practice of awarding overtime – The Board found that there appeared to be a reasonable basis to conclude that the employer was aware of the organizer's involvement as a union supporter and that its decision to terminate was partly motivated by that – The Board's conclusion was supported by the aggressive position taken by the employer with respect to the union's organizing drive; the timing of the discharge being mere hours after the application for certification was filed; an unaddressed statement that the discharge was the result of a directive from head office; and uncertainty with respect to the interpretation and application of the Attendance policy – The Board also found that the denial of overtime hours to W appeared to be a departure from the employer's past practice which was not unrelated to the exercise of

rights under the Act – The Board found the other factors under s. 98, to have been met and made a number of declarations, including reinstatement, and that employees have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support – Declarations made

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *M. Pollock, Jason Sweet, Ken Dean, Chris Duke, Shane Harrison* and *Don Foster* appeared for the applicant; *Daryl Cukierman* and *Jon Domanko* appeared for the responding party.

DECISION OF THE BOARD: June 11, 2009

1. This is an application for interim relief under section 98 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. On April 30, 2009, Teamsters Local Union No. 419, applied for certification under the Act with respect to certain employees of Millard Refrigerated Services Inc. at its facility in Brampton, Ontario (Board File No. 0325-09-R). The union lost the representation vote on May 7, 2009, receiving far fewer votes than the level of support it appeared to have when it filed its application for certification, however that application is still pending: the union seeks remedial certification pursuant to section 11 of the Act. On the night of April 30, 2009, Millard terminated the employment of Chris Duke. On May 7, 2009, the Teamsters filed an unfair labour practices application under section 96 alleging that Millard's termination of Duke was contrary to the Act and that Millard had engaged in certain other actions of intimidation and changed terms or conditions of employment contrary to the Act (Board File No. 0411-09-U). This application, which was filed at the same time, seeks, as interim relief in the pending unfair labour practices application, the reinstatement of Duke, along with other orders in support, and that Millard revert to its past practice with respect to the awarding of overtime hours.

3. In accordance with the Board's Rules of Procedure, the parties filed declarations and submissions in relation to the application for interim relief. The union filed declarations from Duke and from three employees of Millard at the Brampton facility: Don Foster, Mike Walsh and Shane Harrison. The union alleges that the employer departed from its established practice at the facility with respect to awarding overtime hours to Walsh because he was a union supporter. The employer filed declarations from Cameron Callum (the general manager of the facility), Ken Munroe (the operations manager), Kim Lepiane (the officer manager), Bryan Wilson (a shift supervisor) and Jim Clegg (an outside consultant). A consultation was held on May 19, 2009. The Board asked certain questions to clarify the information on file and heard submissions from the parties.

4. Section 98(2) sets out four conditions which must be met before the Board may grant interim orders under section 98(1)(b) or (c). Section 98(3) establishes a further condition which must be satisfied before the Board may grant such interim orders. I will address the condition established by section 98(3) first, followed by the four conditions set out in section 98(2).

The Board shall not exercise its powers under clause (1)(b) [interim reinstatement] or (c) [interim orders with respect to the terms and conditions of employment of an employee who has not been terminated] if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal,

penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee: s. 98(3).

5. This condition requires the Board to determine whether it "appears" that the impugned actions of the employer were not causally related to the exercise of rights under the Act: *Patrolman Security Services Inc.*, [2005] OLRB Rep. Sept./Oct. 818 (October 6, 2005), at paragraph 52. This determination is not a finding of fact, rather it is based on a "preliminary assessment of the quality or robustness of the evidence likely to be heard and tested in the pending application": *Patrolman* at paragraph 67. In making this determination, the Board will have regard to all of the material before it, to determine how the explanation offered by the employer fits with the conduct alleged by the union and whether there appear to be any gaps in either the conduct complained of or the explanation: *K2 Electrical Contracting Ltd.*, [2006] OLRB Rep. May/June 375 (June 22, 2006) at paragraph 44.

6. It appears that Millard Refrigerated Services Inc. is an American which operates the facility in Brampton through an entity called Millard Refrigerated Services-Canada, ULC. The union commenced its organizing drive in January or February, 2009. Duke, Foster, Harrison and possibly other employees from the facility, met with union representatives on April 4, 2009. Thereafter, Duke, Foster and Harrison played an active role in approaching other employees about supporting the union. The employer denies that it had any knowledge of Duke's involvement prior to May 1, 2009 when it received a letter from the union's counsel with respect to Duke's termination the day before.

7. It appears that there is little question that the employer was aware of the union's organizing drive. It hired two consultants, Jim Clegg and Amed Santana, to assist it in resisting the union drive. Clegg first made an appearance in the workplace during the week of April 19, 2009. The union's declarants state that Clegg would approach workers in the facility and tell them that unions were not beneficial organizations rather they preyed on labour by promising the world but only took their money as union dues. Clegg would also tell workers that he was there to help them understand what a union really is and how it is detrimental to labour. Once, however, it became apparent to Clegg that an individual was a union supporter he would stop approaching them. As noted, the employer filed a declaration from Clegg. Clegg's declaration does not address any of these allegations.

8. Nick Dayan, Vice President, Human Resources, of the American parent company, came to the Brampton facility on or about April 29, 2009. He introduced Clegg and Santana to shift meetings. A union declarant asserts that Dayan specifically stated that Clegg and Santana worked for him. Other meetings were also held by the employer over the course of the next several days. Anti-union presentations were made at all of these meetings. Clegg's declaration does not address these allegations. No declarations were filed from Dayan or Santana.

9. The union's declarants assert that once it became apparent to the employer that a particular employee supported the union he or she was not invited to, and was indeed uninvited from attending, any more of these employer meetings. The employer's declarants do not address these allegations.

10. Duke was off work from April 27 through April 29 following dental surgery. His employment was terminated on April 30 upon his return to work, as discussed further below. Accordingly, he was not present during the period that the employer was conducting the meetings. However, he asserts that while he observed Clegg approaching other workers during his shift on April

23 and making negative comments about the union to them, Clegg never approached him. Clegg's declaration does not address this allegation. It is to be noted that this is the same conduct which it appears Clegg engaged in when he perceived someone to be a union supporter. Clegg does, however, specifically deny that he knew or suspected that Duke was a union supporter. As no declarations were filed by Santana or Dayan, there is no denial that they knew or suspected that Duke was a union supporter.

11. Upon his return to work on April 30, Duke was summoned to a meeting with two supervisors: Wilson and Sean DeGroot. He was told that his employment was being terminated as a result of poor attendance. Duke states that during the meeting DeGroot stated that "it came down from head office that I was to be terminated due to absenteeism". The employer's declarations do not specifically address whether this statement was made. No declaration was filed from DeGroot. While a declaration was filed from Wilson, it does not address this statement at all. Callum, who was not present at the meeting, asserts not that the statement was not made but rather that the decision did not come down from head office and that it was made by "management at Millard's Brampton facility solely on the basis that Mr. Duke violated Millard's Attendance Policy".

12. Duke asserts:

> After the termination meeting, I was escorted to my locker and out of the building by Brian Wilson. When the employer terminates an employee, the employee is escorted to their locker and then out of the building in this fashion. Other employees watched me being escorted out in this manner.

The employer's declarations are not responsive to this assertion. In my view, it is clear that if the other employees associated Duke's termination with union activities, the employer's actions would have a chilling effect on the union's campaign. It appears to be an available inference, in particular given what appears to have been an aggressive response to the union drive, that the employer's actions were designed to have that effect.

13. The employer's declarations focus on Duke's violation of the Attendance Policy. The Policy is not a model of clarity. It has a "points system" which is said to "run in tandem" with the 10 "personal emergency leave" days that are granted under the *Employment Standards Act, 2000*. The points system provides for progressive discipline, the accumulation of 10 personal emergency days does not. Duke had received a disciplinary warning with respect to an earlier period of attendance problems but received none with respect to the attendance problems relied upon by the employer for his discharge. The Policy has changed at least once during the course of Duke's employment and Callum found it necessary to post a memo dated December 19, 2008 with the subject line "Clarification of Attendance Policy".

14. The Policy states that "EITHER the accumulation of 10 points under the company system, or the use of more than 10 days of Emergency Leave, NOT BOTH, will be cause for termination of employment" (emphasis in policy). As counsel for the union points out, it remains unclear who decides which to apply to a given employee. It is also not clear that the Policy itself provides for automatic termination (saying that something "will be cause for termination" is not the same as saying that someone "will be terminated"), and none of the employer's declarants specifically state that it does. In any event, it is not clear that the Policy is consistently applied. While the employer's declarations assert that the Policy is consistently applied and refer to other employees who have been terminated "due to poor attendance", it is not clear that those employees were automatically

terminated upon the accumulation of 10 points or use of more than 10 days of Emergency Leave, or that every employee who reached these thresholds was so terminated.

15. The issue for the Board in the pending application is not whether Millard had cause to terminate Duke's employment. The issue for the Board is whether the termination of his employment was contrary to the Act. Millard may have had cause to terminate Duke's employment but still be found to have violated the Act if that decision was tainted by anti-union animus. On the material before me, there appears to be a reasonable basis to conclude that, notwithstanding its denials, Millard was aware of Duke's involvement as a union supporter and that its decision to terminate his employment was motivated in part by that. In particular, the aggressive position taken by the employer with respect to the union's organizing drive, Clegg's treatment of Duke in the same manner as other perceived union supporters, the timing of the discharge, mere hours after the application for certification was filed, the unaddressed statement to Duke that his discharge was the result of a directive from head office, the absence of a declaration from Dayan, the Vice President from head office, all support this conclusion, while the uncertainty with respect to both the interpretation and consistent application of the Attendance Policy undermine the appearance of a legitimate explanation for the discharge. Accordingly, it does not appear to me that the termination of Duke's employment was unrelated to the exercise of rights under the Act, and accordingly the precondition established by section 98(3) with respect to an order for the interim reinstatement of Duke is satisfied.

16. I turn now to the question of overtime, and the allegation that the employer departed from its past practice with respect to awarding overtime to Walsh because he was perceived as a union supporter.

17. Walsh asserts that he signed a union card on April 6, 2009. He asserts that he had not been invited to the shift meetings which the employer held to present arguments against unionization. He further asserts that he repeatedly asked his shift supervisor, Brian Bucker, why he was not invited to the meetings and that Bucker told him that he was being blacklisted because he was a suspected union supporter. The employer has filed no responding declaration from Bucker. Similarly, Walsh asserts that on May 6, 2009 he separately asked "Barry", a manager, and Callum why he was being excluded from the meetings at which unionization was being discussed and that both told him that it was because there were rumours or suspicions that he was involved with the union. The employer has filed no responding declaration from "Barry". Callum's declaration does not specifically address this assertion.

18. Walsh further asserts that on April 27, 2009, he was approached by the facility's operations manager, Munroe, who demanded to know whether he was a union supporter or not. Walsh's declaration continues:

> Mr. Munroe told me that my answer did not matter because he knew that I was a union supporter. He told me that I had been seen talking to other pro-union employees. He also told me that his conversation with me had "never happened."

Walsh asserts that he told Bucker about this incident, and that Bucker "simply told me that I am being watched". As noted, the employer filed no responding declaration from Brucker. While the employer filed a declaration from Munroe, it fails to specifically address these allegations at all.

19. The parties agree that Walsh regularly worked overtime at the facility and that during the week of April 27 he applied to work overtime hours that would be available the week of May 2, 2009. The parties also agree that Walsh was not assigned to work overtime hours the week of May 2, 2009.

20. The parties differ in their descriptions of the practice by which overtime hours are assigned at the facility. On behalf of the union, Walsh states:

> Overtime hours are not awarded on the basis of seniority. Rather, Millard posts a list of available overtime hours on the Tuesday of each week. All employees have until Friday of each week to apply to work available overtime hours. On Friday afternoons Millard posts a list of employees selected to work available overtime hours. I understand that in the past employees have been selected to work overtime hours based on the number of overtime hours that they have recently worked, such that available overtime is shared among those employees who wish to work it.

On behalf of the employer, Callum states:

> Millard employees may volunteer to work overtime depending on their availability. Employees will advise management if they are interested in working overtime for a particular week, following which management will determine if overtime is necessary, and if so the number of employees who are needed to work overtime. Millard seeks to ensure that all employees are provided with an opportunity to work overtime if they choose to do so, and that no employee is given more or less opportunity than others to work overtime.

21. Walsh asserts that based on the number of employees signed up to work overtime the week of May 2, 2009 and the number of hours of overtime he recently worked, he expected to be selected to work overtime hours the week of May 2, 2009. He continues:

> At the end of my shift on May 1, 2009 I approached Mr. Bucker and asked him whether I had been selected to work overtime hours the next day. Mr. Bucker was standing with a lead hand from my shift, Jason Shane. Mr. Bucker smirked and asked me if was trying to "make a point" when I signed up to work overtime hours. Mr. Shane accused me of being involved with the Union. I understood from their remarks that I had not been selected to work any overtime hours. In fact, I was not.

The employer has not specifically responded to this allegation: there is no declaration from either Bucker or Shane.

22. The employer's declarations focus on the overtime hours worked by Walsh in the period prior to the week of May 2, 2009. Those declarations suggest that while Walsh worked a lot of overtime, he did not have the distinction of working the most overtime at the facility: during the period June 1, 2008 to April 26, 2009 he was 18th in the facility in terms of total overtime hours and 6th amongst forklift operators. The employer's declarations also contain a blanket assertion that Walsh's overtime hours were not reduced due to alleged or actual union support. However, the employer's declarations do not actually address who was awarded overtime during the week of May 2, 2009 and thus do not contain any specific explanation as to why Walsh was not awarded overtime hours in that week.

23. Given the complete failure of the employer's declarations to respond to the specific allegations of the targeting of Walsh on the basis that he was a union supporter or to provide any specific explanation as to why Walsh was not awarded overtime hours during the week of May 2, 2009, I have no hesitation in concluding that the denial of overtime hours to Walsh appears to be a departure from the employer's past practice which was not unrelated to the exercise of rights under the Act. Accordingly, the precondition established by section 98(3) with respect to an interim order concerning terms and conditions of employment in relation to overtime hours has been satisfied.

The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway: s. 98(2) 1.

24. This condition requires the Board to "determine as a question of fact, whether the circumstances giving rise to the unfair labour practice complaint in the main pending application arose during a campaign to establish bargaining rights": *Patrolman* at paragraph 49.

25. In this case the parties agreed that this condition was satisfied. I agree, for reasons discussed further below. Accordingly, I find that the employer's actions took place within the context of an organizing campaign.

There is a serious issue to be decided in the pending proceeding: s. 98(2)2.

26. This condition requires the Board to "review the pleadings of both parties to determine whether there is a serious issue between them to adjudicate in the main application": *Patrolman* at paragraph 50.

27. The employer concedes that the union's allegations in the pending application that Duke's termination was the product of anti-union animus raise a serious issue for the purposes of this condition. The Board has consistently found such an allegation raises a serious issue, and I so find.

28. The employer, however, contests that the allegations surrounding overtime constitute a serious issue. The employer argues that the union has not demonstrated that there were any alterations in the Walsh's terms and conditions of employment. With respect, this argument fails to address the question posed by section 98(2)2. The question is whether the pending application raises a serious issue, in this instance with respect to overtime. The allegation in the pending application is that the employer departed from its established practice with respect to the allocation of overtime to Walsh on the basis that he was known to be or perceived to be a union supporter. In my view, this is a serious issue. The union's allegations, if true, constitute clear breaches of section 70, 72, 76 and 86 of the Act and would likely have a chilling effect on the union's on going organizing drive. A union is not required to "demonstrate" a change in terms and conditions of employment for the purposes of satisfying the condition set out in section 98(2)2, or for that matter in section 98(3). The latter condition is satisfied on an appearance test. For the reasons stated above, I am satisfied that the union has met that condition as well.

The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives: s. 98(2)3.; and

The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding: s. 98(2)4.

29. These two conditions:

> ... both require the Board to draw conclusions as to the likely prospective consequences to the parties where the relief sought is or is not granted. Both sections require the Board to attempt to anticipate the degree of harm or the labour relations consequences which will occur, as a result of the granting or withholding of relief. Both require the Board to examine the current circumstances of the parties and to then extrapolate to predict likely future outcomes.
>
> (*Patrolman* at paragraph 51.)

30. In *K2 Electrical*, at paragraph 30, the Board described the manner in which these determinations were to be made as follows:

> In my view, for the purposes of the interim application, the determination of each party's circumstances is to be made primarily on the declarations filed by that party, as supplemented through information obtained by the Board at the consultation, and through the application of the Board's experience, in particular with respect to the prediction as to likely future outcomes. This appears to me to be the nature of the exercise which the Board undertook in *Patrolman*.

31. I will consider first the question of the interim reinstatement of Duke. The employer recognizes that the dismissal of an inside organizer will harm the union, but argues that as the representation vote has taken place already and Duke was able to cast a vote that harm cannot be said to be irreparable. I do not accept this argument. As conceded by the employer, notwithstanding the fact that a representation vote has taken place the organizing campaign is not over. The union seeks remedial certification pursuant to section 11 of the Act. It will require the support and co-operation of employees in the bargaining unit in order to advance its case. This is unlikely to occur if the union is perceived as unable to offer meaningful and prompt protection to employees who come forward to assist it from termination by their employer. In addition, Duke, as an inside organizer, facilitates the union's contact with employees for the purpose of obtaining their support and cooperation. Further, it is possible that the Board will order a second representation vote pursuant to section 11 of the Act. The chilling effect arising from the termination of Duke by the employer would seriously undermine the union in the event of such a vote.

32. The employer argues that in any event the balance of harm weighs against the granting of interim reinstatement of Duke. It argues that Duke was terminated for violation of its Attendance Policy; that its Attendance Policy is of critical importance to its operations; and that reinstatement of Duke would convey the message to its employees that they did not need to comply with the Attendance Policy. I do not accept this argument. For reasons stated above, it appears that while Duke may have been in violation of the Attendance Policy, the decision to terminate him was tainted by the fact that he is or was perceived to a union supporter. His interim reinstatement conveys the message that an employee cannot be terminated for reason, in whole or in part, that he or she is a union supporter. This does not mean that an employee cannot be terminated for failure to comply with the Attendance Policy. Indeed, the ability of the employer to do so with respect to Duke is preserved by the order I make in this case as set out below.

33. In the result I find that the interim reinstatement of Duke is necessary in order to prevent irreparable harm to the union's organizing drive and that the balance of harm favours his interim reinstatement.

34. I turn now to the issue of overtime. The interim order sought by the union is as follows:

> An order that the responding party immediately revert to its past practice of awarding overtime hours at Millard Refrigerated Services, Inc.'s warehouse at 745 Intermodal Drive, Brampton, Ontario and that no employees be barred from overtime work because of union support.

(Of course, in the pending application, the union also seeks compensation for Walsh for the employer's failure to grant him overtime in the week of May 2, 2009.)

35. With respect to the issue of whether this interim order is necessary in order to avoid irreparable harm, the employer's position is: "there has been no alteration of the terms and conditions of Mr. Walsh's employment or any other employee's employment in respect of overtime hours. Millard continues to provide overtime opportunities to all eligible employees, regardless of perceived or actual union support". With respect to whether the balance of harm favours the granting of this interim order, the employer's position is: "To the extent that the Union is requesting the Board to order Millard to allocate a specific number of overtime hours to specific employees, Millard takes the position that any such order would undermine management rights."

36. I start first by observing that the union is not "requesting the Board to order Millard to allocate a specific number of overtime hours to specific employees": it seeks an order directing the employer to "revert to its past practice". While the union's description of that practice appears to differ from the employer's description, it does not require the employer to allocate a specific number of hours to specific employees. Second, while the parties disagree about whether the employer's practice was departed from in the past with respect to Walsh, there is no disagreement that on a go forward basis overtime opportunities should be awarded on the basis of the employer's past practice, without regard to perceived or actual union support. Third, in any event, by virtue of section 86(2) of the Act, the employer is required not to alter, without the consent of the union, the terms and conditions of employment which existed as of the date of the application for certification until such time as the union is certified and gives notice to bargain, in which case the comparable provisions of section 86(1) apply, or the application for certification is dismissed. This would include the employer's existing practice with respect to overtime opportunities.

37. What then is the effect of granting an order directing the employer to do on an interim basis that which both parties agree that it should do and which as a matter of law it is required to do in any event? It is that such a mandatory prospective order, in effect *quia timet* relief, is enforceable through the courts: breach of such an order is civil contempt. Such an order should be granted with caution.

38. To be clear, there may be circumstances which warrant the granting of such an order. For example, if the employer were to repeatedly depart from its practice with respect to awarding overtime on the basis of real or perceived union support, such an order might well be necessary. However, in this case, while the employer's denial of overtime to Walsh appears to have been on the basis of his actual or perceived support of the union, the action was isolated. Accordingly, I decline

to grant the union's request for an interim prospective mandatory order with respect to the allocation of overtime, without prejudice to the union's right to re-apply should there be further repeated breaches of past practice and the Act by the employer.

39. I do, however, agree with counsel for the union that some order with respect to the overtime issue is necessary in order to prevent irreparable harm to the union. In the context of this case, denial of overtime opportunities by Millard on the basis of real or perceived union support when coupled with the aggressive anti-union campaign which the employer appears to have undertaken, including notably the apparent termination of Duke on the basis of his actual or perceived union support, conveys a message to employees that there are consequences for supporting the trade union. The union remains in a vulnerable period of its organizing campaign and would be irreparably harmed for the reasons stated above. Accordingly, I consider it appropriate to issue a declaration notifying employees that they have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support. The balance of harm favours the granting of such a declaration.

Disposition

40. The Board declares that employees of Millard Refrigerated Services-Canada, ULC and / or Millard Refrigerated Services Inc. at its Brampton facility have the right to receive overtime in accordance with the employer's past practice, without regard to actual or perceived union support.

41. The Board orders Millard Refrigerated Services-Canada, ULC and / or Millard Refrigerated Services Inc. to:

a) reinstate Chris Duke immediately to his employment on the same terms and conditions he enjoyed prior to April 30, 2009;

b) refrain from suspending, discontinuing or otherwise terminating, Chris Duke's employment or changing the terms and conditions of his employment until the Board issues final decisions in the unfair labour practice complaint (Board File No. 0411-09-U) except with the consent of the Union or of the Board, on application by the responding party;

c) post a copy of this decision in conspicuous locations where its employees are likely to see it;

d) keep these copies of this decision posted for not less than 30 days.

e) post a copy of the attached Notice to Employees in conspicuous locations where its employees are likely to see it and keep it posted for 30 days.

42. I remain seized to deal with any issues arising out of the implementation of this decision.

0939-07-R National Automobile, Aerospace, Transportation and General Workers' Union of Canada (Caw-Canada), Applicant v. **National Waste Services Inc.**, Responding Party, v. Erie Personnel Corporation, Intervenor

Certification – Employer – The sole outstanding issue concerned whether National or Erie Personnel was the employer of the drivers and pitchers working out of a waste and recycling yard in Stoney Creek – The facts were not in material dispute and the Board began its analysis by noting that the Supreme Court in *Pointe-Claire* made it clear that in assessing the true employer in these triangular relationships what is essential is determining which party exercises the greatest control over all aspects of the employee's work – The Board applied the factors from *York Condominium Corporation* and found only one factor pointed toward Erie (the intention to create an employment relationship) – The Board found that National had the fundamental control over the working conditions of the drivers and pitchers – Finally the Board noted that its finding was not altered by the recent (not yet in force) changes to the *ESA, 2000* under Bill 139 which will make temporary help agencies the employer for the purposes of the *ESA, 2000* – Certificate issued

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Farah Baloo, Peter Shklanka, Bob Van Cleef* and *Murphy Fries* appeared for the applicant; *Paul Wearing, Gary Blacktopp, D. Ardellini* and *Rick Lindsay* appeared for the responding party; *Alan Freedman, Glenn P. Christie, Michelle Alton, Marina Butler* and *Pamela Morin* appeared for the intevenor.

DECISION OF THE BOARD: June 8, 2009

1. This is an application for certification filed under the provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The application relates to drivers and pitchmen (hereinafter "pitchers") working out of the Stoney Creek yard who are supplied by the intervenor, Erie Personnel Corporation ("Erie"), to the responding party, National Waste Services Inc. ("National").

2. By decision dated June 14, 2007, the Board (differently constituted) directed that a representation vote be taken in the following bargaining unit proposed in the application for certification:

> all employees of National Waste Services Inc. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, and office, clerical and salaried employees.

The only dispute between the parties concerns the proper identity of the employer given the responding party's contention that it is not the employer of the employees whom the applicant seeks to represent. Both the responding party and the intervenor, Erie Personnel Corporation ("Erie"), contend that Erie is, in fact, the employer of the drivers and pitchers.

3. The vote was held on June 18, 2007. The majority of the ballots were cast in favour of the applicant. The sole outstanding issue that requires determination in this certification application therefore concerns whether National is the employer of the employees whom the applicant seeks to represent.

4. The Board heard evidence from six witnesses in this proceeding. Ms. Judy Rice, National's Operations Manager at National's Stoney Creek yard, Mr. Gary Blacktopp, National's

Vice-President of Operations and Maintenance, and Mr. Rick Lindsay, National's Safety and Compliance Manager, testified on behalf of National. The applicant called evidence from Mr. Fred Collette and Mr. Dwayne Anderson, who are both drivers who were supplied by Erie to National and who worked out of National's Stoney Creek yard at or around the date of the application. Ms. Pamela Morin, Erie's General Manager, testified on behalf of the intervenor.

5. The evidence was, for the most part, not in material dispute. In arriving at my findings of fact in this case, I have considered all of the evidence and taken into account such factors as what seems most reasonable and probable in all of the circumstances having regard to the evidence as a whole.

Background Facts

6. National has been operating a waste and recycling business in Ontario since 2000. Its business involves the hauling of commercial and residential solid waste and recycling. It operates out of five separate yards, including a yard at Stoney Creek (the "Stoney Creek yard"), which is the subject of the application for certification. National employs a number administrative staff at its head office and at its yards.

7. In 2006, National was awarded a five year contract by the City of Hamilton ("the City") to remove residential waste from houses, apartments and condominiums located in the City. The term of National's contract with the City (the "Hamilton Contract") is from April, 2006 to April, 2011. In order to fulfill its obligations under the contract, National set up the Stoney Creek yard. It did so by, among other things, entering into a month to month lease for a parcel of land, and setting up office facilities in a modular trailer, obtaining thirty-five waste disposal trucks, and hiring office staff.

8. National also entered into a contract with Erie for the provision of drivers and pitchers. Although National directly employs approximately eighteen drivers, none of them work in the City of Hamilton or out of the Stoney Creek yard. All of the drivers and pitchers working out of that yard are supplied to National by Erie. National also used two other personnel agencies to supply drivers and pitchers for brief periods at around the start of its contract with the City in 2006. It did so because Erie was unable to supply a sufficient number of drivers and pitchers to it at that time.

9. The office facilities at the Stoney Creek yard have two separate entrances: one for National's office staff and the other for drivers and pitchers supplied by Erie. The facilities are also divided inside into two areas by a counter. There is an office area on one side of the counter and a change room and a lunch room as well as a time clock on the other side used by drivers and pitchers.

10. National's staff, who work out of the Stoney Creek yard, consist of an Operations Manager, a dispatcher, a clerical employee, a salesperson and two route supervisors. At the relevant time, Ms. Crystal Chioini was the dispatcher, Ms. Rice was the Operations Manager and Messrs. Mike Conacher and Glenn King were the route supervisors. All of these individuals were employed by National.

11. Erie operates a staffing agency out of three branches: one in Thorold, one in Fort Erie and one in Stoney Creek. It has over 200 clients and has been in business since the 1990's. It supplies and fills various positions for companies throughout Ontario by conducting an initial screening of candidates against job descriptions, conducting interviews and background checks, providing client

specific orientation and ultimately hiring staff for placement. Ms. Morin is responsible for all three branches and staff working at all three locations, including receptionists, payroll, recruiters and sales staff, report to her.

12. National is a client of Erie's Stoney Creek location, which is its smallest location with only approximately seven clients of which National is the largest. Erie also serves other clients in the waste and recycling industry in Smithville and in Niagara. Erie's clients also include companies working in construction, manufacturing and shipping. At the relevant time, Clayton Mohammed and Melanie Storm worked at Erie's Stoney Creek branch as recruiters. They reported to Ms. Morin and were responsible for recruiting drivers and pitchers to supply to National. According to Ms. Morin, there was little overlap between the drivers and pitchers assigned to National and those assigned to Erie's other clients in the waste industry located in Smithville and in Niagara due largely to the distance between their respective operations.

Recruitment and Training Process

13. Prior to the start-up of National's operations in Stoney Creek in 2006, Mr. Lyndsay and Mr. Danny Ardellini, the President of National, had discussions with Ms. Morin concerning National's expectations for screening candidates. During the course of three meetings held in February or March 2006, representatives of National provided representatives of Erie with copies of National's policies and procedures and communicated National's expectation that Erie would meet or exceed its own standards. Ms. Morin later typed up job descriptions for drivers and pitchers based on verbal descriptions given to her by representatives of National. Representatives of Erie and National also discussed the issue of reference checks and the need for drivers to have a clean Commercial Vehicle Operator Record Ontario Driver Abstract ("CVOR abstract"). In particular, they reached agreement prior to the start up that Erie could consider a prospective driver if he or she had two infractions (depending on the type of infraction) and they established a matrix of what constitutes an acceptable driving record for the purposes of meeting National's insurance requirements.

14. Pursuant to the terms of Erie's contract with National, Erie was required to develop orientation packages specifically designed for individuals assigned to National and were to include National's "policies and procedures, expectations and accountability, safety procedures/equipment, work hours, break times, security procedures, parking, etc." as well as an orientation acknowledgement document.

15. Erie consequently developed a safety orientation manual for employees dispatched to National, which manual adopts many of National's own policies and procedures, such as National's mission statement, some of National's operating procedures and National's policy on bin throwing and on accident reporting. Erie also included in that manual some additional policies and procedures, such as a harassment policy and hiring procedures.

16. Erie recruiters are generally responsible for screening resumes sent to Erie against job descriptions for drivers and pitchers and are also responsible for reviewing the driver's abstracts to ensure they are acceptable. Borderline cases are discussed with representatives of National. An example of this occurred on June 26, 2007 when Ms. Storm e-mailed Ms. Rice the CVOR and abstract for a candidate for a driver loader position and asked Ms. Rice if the individual was eligible for placement at National. Ms. Storm explained in her e-mail that she was doing so "because [the individual] falls under questionable within the matrix". Ms. Rice testified that, in these

circumstances, Mr. Lindsay would be consulted regarding a driver's information to determine if accepting the individual would adversely affect National's insurance.

17. National takes a more active role in screening prospective candidates for specialized positions such as that of a front-end driver. Ms. Storm from Erie, for example, e-mailed Ms. Rice resumes of prospective candidates for Ms. Rice's consideration on numerous occasions in May and June 2007. In April 2007, Ms. Rice also communicated to Ms. Morin that she wanted to be involved in interviewing some of the front-end driver candidates.

18. After the initial screening of resumes, prospective candidates are invited to Erie's Stoney Creek office where they are given an orientation, shown some training videos, and are then tested on the content of those videos. The training and testing includes the following:

1. a video on garbage collection and safety followed by a test;
2. a video on safety at the transfer station followed by a test;
3. a video on safety at the landfill followed by a test;
4. a video regarding training the refuse driver followed by a group discussion with Erie recruiters;
5. a video concerning WHIMIS followed by a test;
6. a video regarding back safety and proper lifting procedures followed by a test;
7. a general health and safety test.

National had no involvement in formulating these videos or tests, since they were all purchased by Erie before it entered into its contract with National. Erie provides National with a summary of the test scores for those individuals assigned to National. National has to provide that information to the City to meet its contractual obligations with the City.

19. Erie recruiters also interview prospective candidates by asking them questions which Erie developed for positions in the waste industry and by asking them for up to three references. For reasons of confidentiality, Erie does not disclose details of these reference checks (such as the name of the reference) to National. During the course of their interview with Erie recruiters, prospective candidates are asked to sign and complete an application form, which form asks for information about the individual's prior work experience and education and driver's license qualifications. The application form includes the following acknowledgement:

> I understand that I am hired by Erie Personnel on a "term & task" basis and that I am in no way a full time employee of the company. I agree that Erie Personnel be indemnified & saved harmless, without liability to me for wages or salary except such as may have been earned at the date of termination.

The acknowledgement set out at the bottom of the application form further requires the individual to confirm having been informed of Erie's safety guidelines, regulations, accident reporting procedures and WHMIS orientation and to confirm the individual's obligation to comply with all safety rules and regulations while on temporary work assignments with Erie.

20. During the interview process, prospective candidates are taken through, and asked to sign off on, an orientation checklist consisting of some twenty items. Items reviewed include information concerning Erie's payroll policies, their right to refuse work, the after hour service and the process for

cancellations. Erie also provides candidates with its "Industrial & Office Policy Manual", which is provided to all Erie employees and is not tailored to National. It explains such things as Erie's payroll policies and the fact that employees are considered by Erie to be "elect to work employees", meaning that they can choose whether or not to accept a vacancy. Some of the items covered in that manual do not apply to drivers and pitchers, such as the references therein to time slip procedures and to office dress code. Erie also provides candidates with a safety orientation manual, which manual is, as noted, tailored to National. Candidates are also advised of Erie's harassment policy and are asked to sign its extra hours of work agreement and its averaging of overtime agreement for the purposes of employment standards legislation.

21. Following this process, individuals hired by Erie and assigned to work at National as drivers are referred to National's Stoney Creek yard where National's route supervisors give them a road test. When conducting the road test, National's route supervisors complete a road assessment form, which indicates whether the prospective driver has passed or failed various aspects of vehicle operation. Drivers are required to pass that test in order to work for National.

22. Route supervisors also give drivers and pitchers assigned to National by Erie an orientation at the Stoney Creek yard, during which time route supervisors train drivers and pitchers on the day to day requirements of their job, including on the operation of the vehicles, the procedures for picking up waste, the procedures at the transfer station as well as proper circle checks. National's route supervisors who conduct this two hour training go through and complete the training itemized on an Erie document entitled "Rear Load Driver & Helper Training Form". According to the evidence, this training generally takes approximately two hours to complete. Ms. Rice noted that National is required to confirm at its monthly meetings with the City that all licensed drivers working on the contract have been appropriately trained.

23. Individuals referred by Erie to National have in some cases responded to an advertisement for drivers placed by Erie and, in other cases, have been referred to Erie by someone at National, such as by Ms. Rice or Mr. Conacher.

24. The evidence with respect to the hiring of Mr. Colette is that he responded to an advertisement for drivers placed by Erie and then participated in the interview and orientation process conducted by Erie's recruiters described above. He was then offered employment by letter dated March 25, 2006 from Erie "as an Elect to Work/Term & Task Employee". The offer letter notes that he will be dispatched for the position of driver/loader at a specified hourly rate and that the offer is conditional on his ability to satisfy Erie's medical requirements and/or receipt of satisfactory references. He accepted that offer prior to being dispatched to National's Stoney Creek yard where he met with a route supervisor for a driving test and further training.

25. The hiring process followed in respect of Mr. Anderson differed in that Mr. Anderson was contacted by Mike Conacher of National about the opportunity to work as a driver at the Stoney Creek yard immediately after Mr. Anderson was let go by his former employer. Mr. Anderson's evidence suggests that he attended at the Stoney Creek yard and was trained and also worked for National for several days before being directed to Erie's offices to complete an application form and to participate in Erie's training and orientation process. Mr. Anderson, like Mr. Colette, received an offer of employment from Erie and was paid throughout by Erie for the work he performed at National's Stoney Creek yard.

Financial Arrangements between Erie and National

26. Under the terms of the contract between Erie and National, weekly reports of hours worked by those assigned to National are to be formulated by National on an excel spreadsheet and forwarded electronically to Erie. Payroll Entry Sheets prepared by National are in fact regularly forwarded to Erie for payroll purposes. Erie then invoices National bi-weekly based on the hourly rates established for each classification in their contract plus a mark-up. Under the terms of their contract, a 2% penalty is applied to overdue accounts after 30 days.

27. While the hourly rates paid to drivers and pitchers are for the most part established under the contract, pay rates for specialized drivers such as front end or swing drivers are from time to time the subject of negotiation with prospective drivers. Ms. Rice, for example, testified that a driver who drove both front end and swing trucks came to her and asked her for a raise and that she and Mr. Blacktopp then decided to approve his request. Ms. Rice also acknowledged that National could direct that such a raise be given to individuals assigned by Erie, since Erie would simply bill back the amount paid to the driver plus a mark-up. Erie's mark-up takes account of such things as its administration and payroll costs, the cost of WSIB coverage, CPP and EI premiums, as well as its profit.

28. The cost of the health benefits (provided to drivers and pitchers who have worked on National's contract for over 90 days) is not included in the hourly rate negotiated for the different classifications of employees. Instead, Erie administers those benefits and bills back the cost of them to National monthly.

29. The terms of the contract between National and Erie also notably stipulate that "[a]ll bonus and incentives will be incurred by National Waste Services at their sole discretion and who, in turn, will direct Erie Personnel to administer said bonus and incentives to the workers who qualify." Mr. Lindsay testified that National introduced a safety incentive bonus, under which employees could earn up to $900 per year if no deductions were made throughout the year for safety infractions. The incentive bonus initially only applied to drivers, but the President of National subsequently decided to extend the safety incentive bonus to pitchers as well. The amount of the safety bonus is paid out by Erie to employees at the end of the year and the cost of the bonus is charged back to National as contemplated under their contract.

30. National is also responsible for the cost of monthly recognition awards, the cost of annual appreciation barbeques and the cost of standby employees provided at a rate of three hours minimum per employee. Pursuant to the contract between National and Erie, safety vests and safety gloves are provided by National with no cost to Erie whereas Erie provides workers with CSA approved work boots and National pays a boot allowance of up to $100 for each employee.

31. In one instance referred to in evidence, an issue concerning responsibility for payments made to three employees arose between representatives of Erie and National at a meeting held on December 7, 2006. The issue concerned whether three employees, who were sent home because they were not scheduled, were going to be paid the minimum three hours reporting pay contemplated under the contract. Ms. Morin testified that she simply advised National that these individuals would receive the minimum three hours reporting pay. According to the minutes of their meeting, Erie was not going to cover the cost of this "sent home pay", since Erie recruiters were not made aware of the line up changes.

Scheduling and Supervision of Drivers and Pitchers

32. National's requirements for drivers and pitchers fluctuate daily. National however generally always requires a group of approximately forty drivers and pitchers (or twenty pairs of workers). Although the turnover in staff assigned to National is high and was estimated by Ms. Morin to be approximately sixty percent, there is also a group of regular drivers and pitchers who work from day to day.

33. Mr. Colette and Mr. Anderson, for example, both worked for National on a full-time schedule of between forty-five (45) and sixty (60) hours per week from Monday to Friday. The evidence further discloses that Ms. Rice wrote a letter dated March 6, 2007 confirming full-time employment on behalf of one such full-time driver at his request, in which she notes that "[h]e works full time and 5 days a week" and that "[t]here is no reason to believe that his position here is in jeopardy of being downsized/eliminated, as long as his attendance and performance do not change".

34. National advises Erie daily of its requirements for drivers and pitchers for the next day. Erie then arranges for the requisite number of drivers and pitchers to go to National's Stoney Creek yard the following morning. Erie is responsible for supplying the requisite number of workers to the yard, but is not involved in placing individuals on specific routes. That is done by National. According to Ms. Rice, National pairs up drivers and pitchers who work well together and National also tries to assign them the same truck from day to day.

35. Typically, National representatives fax to Erie sometime in the afternoon a "drivers daily line up sheet", which sets out National's "wish list" of the specific drivers and pitchers to be assigned to specific routes and trucks for the next day. Erie then faxes back the same form with notations regarding which named drivers are confirmed for the next day. Erie's notations may also include some substitution of individuals requested with other names. The next day, after the drivers and pitchers have reported to work, National faxes back to Erie the same form, which indicates what actually occurred that day and includes notations regarding any cancellations or no-shows.

36. Ms. Morin testified that, in accordance with Erie's normal operating procedure, Erie's recruiters contact all drivers and pitchers on a daily basis in the evening to advise them of their assignments for the next day. Ms. Rice however noted that, at Erie's request, National would often confirm that a driver or pitcher was coming in the next day and then relay that information to Erie. While Ms. Morin acknowledged that, for a period of time, representatives of National contacted workers by two way radio sometime during the day to confirm their assignment for the next day, Ms. Morin maintained that Erie recruiters contacted all drivers and pitchers daily with the exception only of those who had indicated to Erie that they did not wish to have their family life disrupted with daily calls. By contrast, Mr. Colette and Mr. Anderson testified that they simply showed up at National's yard the next day and that no one from Erie called them to confirm their assignment. There was further no suggestion in their evidence that they had ever requested that Erie not call them daily.

37. The Board accepts the evidence of Mr. Colette and Mr. Anderson that they were not contacted by Erie recruiters on a daily basis. Ms. Morin did not, in any event, have direct knowledge that Erie recruiters made daily phone calls to every single individual assigned to National. As such, while Erie's policies and procedures require that recruiters contact all staff on a daily basis except if a worker has requested otherwise, the evidence before the Board suggests that did not always happen in the case of workers assigned to National.

38. With respect to cancellations, drivers and pitchers are informed during their orientation at Erie's offices that they are expected to call Erie's twenty-four hour service if they are unable to report to an assignment and that Erie has a toll free telephone number for this purpose. Ms. Rice's evidence however indicates that drivers and pitchers would often call National regarding cancellations. Mr. Colette also testified that Crystal Chioni, a dispatcher at National, asked him to call National in the event that he had to cancel his assignment and that he had done so. Ms. Morin similarly acknowledged that there were instances when Erie found out about cancellations from National and noted that Erie had had to re-educate drivers and pitchers about the cancellation policy.

39. The evidence with respect to time off requests made by drivers and pitchers also discloses a mixed practice. Ms. Morin testified that such requests were supposed to be directed to, and approved by, Erie. Erie's Vacation/Day Off Request form, which drivers and pitchers were required to submit when making such requests, notes the requirement pursuant to National's Policies and Procedures, that the individual must provide the completed document setting out their request for time off to Erie within five days prior to the requested day off or no later than thirty days for vacation time. The evidence however discloses numerous instances in which representatives of National e-mailed representatives of Erie notice of vacation or time off requests, which drivers and pitchers had made directly to National. In addition, Mr. Colette testified that, on one occasion, he asked Ms. Rice if he could take a day off to attend his wife's citizenship ceremony and that she had approved his request on the spot. In another instance, however, Ms. Rice advised Melanie Storm of Erie that Mike Vizzarri would not be able to take a requested day off, but Erie approved his request notwithstanding Ms. Rice's concern about not being able to replace him.

40. The e-mail exchanges between representatives of Erie and of National also indicate a degree of confusion and frustration between them concerning whose responsibility it was for receiving and approving vacation and time off requests. For example, by e-mail dated August 3, 2006, Ms. Rice sought to clarify this issue with Ms. Morin, as follows:

> My understanding is that Eire (sic) is now controlling booked days off. Darren Busky just called me and informed me that Melanie told him to call me and clear it with me for a day off.
>
> I am very confused…….

By e-mail sent to Ms. Rice the next day, Ms. Morin clarified as follows:

> I looked into this, and Melanie was just trying to ensure you would be all right should this fellow book out as he is a front end driver. In the future we will go ahead and deal with these issues on our own.

It is however apparent from Ms. Morin's evidence and her subsequent e-mail exchange with Ms. Rice months later in December, 2006 that the issue of National approving Vacation or Day off Requests, rather than directing them to Erie, was a source of some frustration for her. She testified that she sent the following e-mail to Ms. Rice on December 6, 2006, in which she claims to have been "sarcastic":

> Judy
> I noticed that National Waste is still using the EPC [Erie] Vacation or Day off Requests, Since we have no authority on time off, our forms should not be

> utilized for this. Would it be too much to ask to have you generate a NWS for for (sic) these types of requests.
>
> Thanks in advance for your co-operation in this matter.

Ms. Morin testified that she was being sarcastic when she stated that Erie has no authority on time off, because she was frustrated by the fact that Ms. Rice was not adhering to their policy, which requires all employees to contact Erie to request vacation time or other time off. It therefore appears from a totality of the evidence that Erie was supposed to be in charge of granting vacation and time off requests, but that drivers and pitchers frequently asked representatives of National for permission to take time off. Such requests were then either relayed to Erie to deal with or permission was granted by representatives of National and then communicated to Erie.

41. The day to day supervision of the drivers and pitchers assigned by Erie to National is done almost exclusively by route supervisors employed by National, to whom the drivers and pitchers report. On occasion, National will appoint a driver to act as a lead hand in order to fill in for a route supervisor who is away. That, for example, occurred in the case of Mr. Anderson who was appointed to a lead hand position for a period of time. The lead hand position essentially involves performing the functions of a route supervisor, such as monitoring and reporting any problems encountered by drivers and pitchers on their routes and reporting any breaches of National's policies and procedures.

42. When drivers and pitchers arrive at the yard in the morning, they punch in at the office and consult the daily run sheet prepared by National, which sheet is placed on the counter in the office and which assigns workers in pairs to a particular truck and route. National provides them with a route map indicating the route they are expected to follow and any specific pick-up notations. Before going out on their routes and doing their collections, drivers are required to do a circle check of the vehicle and complete a circle check form and pre-trip inspection form. Once they have completed their routes, drivers call dispatch and report any issues encountered on their routes and may be assigned by dispatch to do other work before returning to the yard. At the end of the work day, the drivers return the truck to the yard where they refuel the vehicle, complete a post trip inspection report of the vehicle, and submit the report to the office. They also hand in their daily run sheet, which details the work performed that day, and then they punch out. Drivers generally return the keys for the vehicle to the office before leaving for the day, but sometimes they take the keys home if they are returning to work at National the next day.

43. National's two route supervisors spend much of their workday on the road working along the various routes supervising the work of the drivers and pitchers. They are responsible for ensuring that National has enough drivers and pitchers and equipment to cover the daily requirements of the Hamilton Contract. Their duties include ensuring that drivers and pitchers are following their routes correctly, conducting spot checks of garbage trucks to ensure the requisite paperwork, first aid kit, and fire extinguisher are in the cab and that the truck is otherwise clean and being operated correctly. They, for example, ensure that drivers are not "rigging", i.e. disarming the safety equipment. The duties of route supervisors also include responding to calls from drivers and pitchers about any problems on their routes and reporting to dispatch if there are any garbage cans left on the street.

44. Route supervisors are also responsible for completing National's Route Observation forms and for attending in the event of an accident or injury involving a driver or pitcher. According to Mr. Lyndsay's evidence, the purpose of this form is to ensure that drivers and pitchers are complying with health and safety legislative requirements and Ministry of Transportation requirements. Route

supervisors are also required to complete National's Injury/Illness Investigation Report used to document accidents. Mr. Lyndsay is also involved in conducting accident reviews and investigations in the event of an accident involving a vehicle and otherwise dealing with National's vehicle insurance policy.

45. Management at National further address safety and performance issues during tailgate meetings with drivers and pitchers, which meetings are held periodically at 6 a.m. before drivers and pitchers go out on their routes and generally address health and safety and performance issues. While a recruiter from Erie is also usually present at those meetings, the discussion of the issues raised at those meetings is generally led by National's management personnel. As noted, National also created a bonus incentive package under which deductions are made to the annual safety bonus in the event of a particular safety infraction. According to Ms. Rice, Mr. Blacktopp created the list of items that warranted a deduction from the bonus. Even though the bonus is administered by Erie, the evidence indicates that management of National requests that Erie make specified deductions to an individual driver or pitcher's safety bonus in the event of a safety infraction.

46. Erie is also involved in safety issues relating to drivers and pitchers. In addition to holding its own health and safety meetings every quarter with staff working from its Stoney Creek location, Erie prepares, and provides to National, employee injury packages, which include template letters to the employee's physician and forms for WSIB purposes. Erie is informed by National of any accidents or injuries involving drivers and pitchers and is also responsible for processing and dealing with workers' compensation claims made by drivers and pitchers. This, for example, occurred in the case of Mr. Colette's workers' compensation claim. Under the terms of the contract between National and Erie, they agreed to work together to enforce a return to work program which may include a shared modified work program with the details of the modified duties equally agreed upon by both of them.

47. National has from time to time accommodated drivers and/or pitchers with modified duties, but was unable to do so, or to continue to do so, in the case of two individuals, Mr. Colette and Mr. Robert Buckingham. With respect to Mr. Colette, National initially accommodated his need for modified work by giving him driving duties only. However, when National would not, or could not, do so any longer, Erie eventually offered Mr. Colette a placement with another client. Mr. Colette never did take up that placement because it was subsequently determined not to be suitable modified work. In the case of Mr. Buckingham, he was accommodated with modified duties at Erie's Stoney Creek office for a period of time.

Discipline and Dismissal

48. In the present case, while Ms. Rice and Ms. Morin both testified that National has no authority to discipline drivers or pitchers assigned by Erie, the evidence indicates that management at National, including Ms. Rice and the route supervisors, did so on a number of occasions by issuing worker warning reports directly to drivers and/or pitchers. For example, on or about February 20, 2007, Mr. King, National's route supervisor issued a written warning directly to a driver for commencing his route prior to 7 a.m. The worker warning report issued to the individual by National was then forwarded to Erie. Another example of this occurred on or about March 17, 2007 when Mr. King issued a worker warning report imposing a three day suspension on a driver for the unsafe operation of a vehicle. That suspension was approved by Ms. Rice.

49. In other instances in which discipline was imposed, National advised Erie of an incident that warranted discipline and suggested the amount of discipline that should be imposed, such as a suspension of a specified number of days or a written warning. While Ms. Rice testified that those requests were merely suggestions to Erie regarding the amount of discipline which should be imposed, the evidence indicates that Erie, for the most part, responded to these "suggestions" by issuing a worker warning report to the individual concerned, which imposed the requested discipline. Ms. Morin, who testified on behalf of Erie, was simply copied on those reports and, in many cases, could not recall the incidents in question. There is therefore little evidence before the Board to suggest that Erie exercised much independent authority to discipline drivers and pitchers.

50. The evidence also indicates that management at National from time to time asked Erie not to assign a particular driver or pitcher to National on an indefinite basis and that Erie complied with such requests.

Decision

51. The issue before the Board is whether National is, in fact, the employer of the drivers and pitchers assigned by Erie to National's Stoney Creek yard. The Board has in numerous instances in the past been called upon to determine whether the client to whom employees are assigned by a personnel agency is in fact the true employer of the employees in question for labour relations purposes.

52. The Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015 has noted the difficulty of determining the true employer in this type of triangular relationship among the agency, the client and the employee. In that case, the Court was considering whether the Quebec Labour Court had made a patently unreasonable decision when it found that a temporary employee hired by the City through a personnel agency was, in fact, an employee of the City within the meaning of the *Labour Code*. In doing so, it noted that the difficulty of determining who is the true employer in these triangular relationships arises from the fact that both the personnel agency and the client have some of the traditional attributes of an employer and that what is essential is determining which party exercises the greatest control over all aspects of the employees' work. The Supreme Court explained the rationale for the emphasis on greatest control and reviewed the jurisprudence of Canadian administrative agencies on this issue, as follows:

> 48. .... In my view, in a context of collective relations governed by the *Labour Code*, it is essential that temporary employees be able to bargain with the party that exercises the greatest control over all aspects of their work – and not only over the supervision of their day-to-day work. Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business.
>
> *(ii) Canadian Cases*
>
> 49. In applying collective labour relations legislation that is similar to that in Quebec, Canadian administrative agencies have also dealt with how to identify

> the real employer in a tripartite relationship. Most of the decisions of those agencies, and specifically the Ontario Labour Relations Board ("OLRB") and the Canada Labour Relations Board ("CLRB"), have noted that the essential test for identifying an employer-employee relationship in a tripartite context is that of fundamental control over working conditions. The application of the fundamental control test leads to an analysis of which party has control over, *inter alia*, the selection, hiring, remuneration, discipline and working conditions of temporary employees and to a consideration of the factor of integration into the business. In the final analysis, the application of the fundamental control test involves an examination of a series of factors that are similar to those suggested by the comprehensive approach set out in *Vassart* and in the Court of Appeal's decision in the instant case.
>
> 50. In applying the fundamental control test, the OLRB and the CLRB have generally concluded that the client is the temporary employee's real employer. See, for example: *Labourers' International Union of North America, Local 183 v. York Condominium Corp.*, [1977] O.L.R.B. Rep. 645; *Hotel and Club Employees' Union, Local 299 v. Sutton Place Hotel*, [1980] O.L.R.B. Rep. 1538; *United Electrical, Radio and Machine Workers of Canada v. Sylvannia Lighting Services*, [1985] O.L.R.B. Rep. 1173; *National Automobile, Aerospace and Agricultural Implement Workers Union of North America, Local 607 v. Grant Development Corp.*, [1993] O.L.R.B. Rep. 21; *International Brotherhood of Electrical Workers, Local 586 v. Dare Personnel Inc.*, [1995] O.L.R.B. Rep. 935; *Nationair (Nolisair International Inc.)* (1987), 70 di 44. However, Canadian administrative agencies have not reached this conclusion systematically. In some decisions, the factual situation led the OLRB and the CLRB to find that it was the personnel agency or supplier that actually had the attributes of an employer. See, for example: *United Brotherhood of Carpenters & Joiners of America, Local Union 93 v. Templet Services*, [1974] O.L.R.B. Rep. 606; *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 819 v. Tower Company (1961) Ltd.*, [1979] O.L.R.B. Rep. 583; *Nolisair International Inc. (Nationair Canada)* (1992) 89 di 94.

In determining which entity is the employer for labour relations purposes, the Board's task is therefore generally to determine whether the client or the personnel agency has the greatest control over all aspects of the employees' work so that the employees can bargain with that entity.

53. The factors the Board has applied in determining who is the employer for labour relations purposes are set out in *York Condominium Corporation No. 46*, [1977] OLRB Rep. Oct. 645 at para 10, as follows:

> 1. The party exercising direction and control over the employees performing the work;
> 2. The party bearing the burden of remuneration;
> 3. The party imposing the discipline;
> 4. The party hiring the employees;
> 5. The party with the authority to dismiss the employees;
> 6. The party who is perceived to be the employer by the employees;
> 7. The existence of an intention to create the relationship of employer and employees.

The Board has not found any of these factors to be determinative, but has generally ascribed greater weight to some factors than others. In *533670 Ontario Ltd. (c.o.b. Best Personnel Services),* [1997] OLRB Rep. September/October 849, the Board described its approach in the following terms:

> 13. None of these factors is necessarily determinative, and the relative significance of any individual factor will depend on the circumstances of the particular case. Having said that, it is apparent that the object of the exercise is to assess the various factors, both individually and in the context of all the factors, in order to ascertain who has fundamental control over the employment relationship, particularly where the factors point in different directions. In making the assessment and determination, the Board is more concerned with substance than with form; that is, the Board will not permit commercial form to obscure labour relations reality.
>
> 14. A natural consequence of this is that the first five factors listed in *York Condominium, supra,* which are indicators of control, have become more important than the last two, which are both more subjective and difficult to gauge. This is consistent with the Board's preference (and the underlying theme of the Act as demonstrated by provisions like subsection 1(4) and section 69) for substance over form and the principle that perception and impression cannot be determinative of a question of law (see, *International Union of Canada and Kent Line Ltd.*, (1972) 27 D.L.R. (3d) 105 (Federal Court of Appeal).
>
> 15. When it comes to a question of fundamental control there is little which is more important than the beginning of the relationship (hiring), regulating it (direction, control and supervision) and ending it (termination). Accordingly, *York Condominium, supra,* factors 1, 4 and 5 have gained primacy. Indeed, even though the Board (and arbitrators) have been careful to say that it will not necessarily be determinative, decisions like *Dare Personnel, supra, Sylvania Lighting, supra* and *Royal Ontario Museum, supra,* demonstrate that direction and control is a very significant factor. At the same time, these decisions also demonstrate that the perception of employees, and commercial contracts as indicators of intention often carry little weight.

No one factor is determinative and the weight ascribed to any one of the factors applied in the Board's assessment will further differ with the circumstances of each case. As noted by the Board in *Sutton Place Hotel,* [1980] O.L.R.B. Rep. 1538 at para 43, "[t]he significance of each indictor can only be ascertained through an appreciation of how they all fit together within the facts of each case." In assessing whether the responding party is the true employer of the employees in question for labour relations purposes, a significant consideration is who exercises fundamental control over their working lives.

Direction and Control over the employees performing the work

54. The union refers to various provisions in the Hamilton Contract in support of its position that that contract requires National to retain direction and control over the drivers and pitchers supplied by Erie. For example, the union notes that the Hamilton Contract requires that National exercise due care and skill in the collection, transportation and disposal of all waste collected under the contract. The contract also contemplates that liquidated damages could be assessed against National for certain specified infractions such as inappropriate behaviour of staff, improperly

replacing containers, the failure of staff to clean up spillage of waste, etc. The union suggests that National must therefore exercise control over the drivers and pitchers since it is liable for the quality of their work.

55. While the responding party and the intervenor do not dispute that the Hamilton Contract requires National to maintain certain standards in respect of work performed by drivers and pitchers, they suggest that these requirements simply form the basis of the level of service that National requires of Erie in their contract for the provision of drivers and pitchers to National. According to counsel for the intervenor, the fact that a client stipulates a certain level of service does not make the client the employer of the employees in question.

56. There is no doubt that National has very specific obligations under the Hamilton Contract in terms of how, when and in what manner, waste is to be collected by the persons National engages to do the collection. Even though the Board appreciates that the extent to which National actually controls and directs the work of the drivers and pitchers assigned to it is likely informed by National's own underlying contractual obligations, what actually occurs in practice is what is most significant.

57. In the present case, virtually all of the day to day supervision of the drivers and pitchers is, in fact, done by route supervisors employed by National. National determines the daily assignment of work for drivers and pitchers, including to which routes they will be assigned, which trucks they will drive and with whom each will work on a given day. National requires them to perform inspections of their vehicles and to complete National's paperwork, including circle check forms, and a daily run sheet detailing the work they performed that day. Once they have finished their routes, they may be assigned other work by National's dispatcher before returning to the yard. After the initial start-up period, Erie recruiters attended at the Stoney Creek yard only occasionally and are not involved in the daily supervision of the work of the drivers and pitchers. While Erie held periodic health and safety meetings for those assigned to work out of its Stoney Creek office, National was responsible for determining whether any deductions would be made to their individual safety bonuses for any infractions noted by National's supervisory staff.

58. National emphasized that Erie controls the assignment of staff to it. However, National determines the number of drivers and pitchers it requires on a daily basis and submits its "wish list" of drivers and pitchers for the next day. Although there is no guarantee that Erie will be able to supply each of the drivers and pitchers requested for the next day's line up, the evidence taken as a whole indicates that Erie sought to do so where possible depending on the availability of the individuals requested. The only evidence to suggest that Erie exercised any independent authority over the assignment of work is in the one instance in which Erie approved Mike Vezzari's time off request despite National's desire that he not be permitted to take the time off.

59. Given National's day to day supervision of, and assignment of work to, drivers and pitchers assigned to work at the Stoney Creek yard, the criterion of direction and control, in the Board's view, points overwhelmingly to National as the employer, notwithstanding that Erie has a degree of control over the assignment of staff to National.

The Burden of Remuneration

60. The financial arrangement between Erie and National for the provision by Erie of drivers and pitchers to work at the Stoney Creek yard is essentially a cost plus arrangement, under which pay

rates plus a mark-up for specific classifications were negotiated by Erie and National at the start of their contract. The evidence taken as a whole indicates that Erie simply charges back to National virtually all of the cost of the wages and benefits for drivers and pitchers. Even though there were some exceptions, such as the cost of a portion of Mr. Buckingham's wages for modified work performed at Erie's own office and the cost of wages for drivers and pitchers to attend a few health and safety meetings held by Erie, National predominantly bore the burden of the remuneration of the drivers and pitchers assigned to it. National also had considerable say in their rates of pay and the amounts of their bonuses.

61. In all the circumstances, the Board rejects the suggestion that Erie's negotiation of a penalty clause for late payment of invoices in its contract with National reflects the fact that Erie bore the burden of remuneration. Erie is simply a paymaster that requires the amounts invoiced to National to meet its payroll obligations, since almost all of its expenses associated with the drivers and pitchers plus a profit are charged back to National.

62. The Board also disagrees with the suggestion made in argument that the incident in December 2006 when Erie advised National that three employees who were sent home were going to be paid the minimum three hours reporting pay suggests that the arrangement between Erie and National was not simply a cost plus arrangement. In this regard, the Board notes that there is no indication in the evidence that the cost of this minimum three hour reporting pay for the three employees involved was not simply charged back to National in the normal course.

63. In the Board's view, the factor of who bears the burden of remuneration also points to National as the employer.

The Hiring of the Employees

64. Erie is largely responsible for finding, screening and referring individuals to National to work as drivers and/or pitchers. This process includes some general training, orientation and testing. Erie offers employment to drivers and pitchers as term and task employees of Erie prior to assignment to National and also has drivers and pitchers sign its averaging of overtime agreement and its extra hours of work agreement prior to assignment to National. National however dictates to Erie the parameters of an acceptable driving record and also takes a more active role in the selection process for specialized drivers. In addition, once individuals are assigned by Erie to work at the Stoney Creek yard, National is responsible for giving drivers a road test and for giving drivers and pitchers job specific orientation and training. A driver who does not pass National's road test cannot work for National. As such, the final say over hiring of drivers to work out of the Stoney Creek yard rests with National. Responsibility for hiring the employees is therefore shared.

65. In the Board's view, the responsibility for recruitment, hiring, orientation and training of staff is shared as between Erie and National, such that this factor does not point clearly to either Erie or National as employer. This factor is therefore neutral.

The Imposition of Discipline and Authority to Dismiss

66. The Board disagrees with the contention that the party making the original offer of employment to drivers and pitchers is indicative of who has the authority to dismiss that individual. Instead, the evidence of which entity actually exercised the authority to discipline and/or dismiss the

drivers and pitchers is, in the Board's view, what is indicative of who is responsible for, or in control of, that aspect of the employment relationship.

67. In the present case, although both Ms. Rice and Ms. Morin testified that National has no authority to discipline drivers and pitchers, the evidence indicates that Ms. Rice as well as National's route supervisors did, in fact, directly discipline drivers and pitchers on a number of occasions by issuing worker warning reports to them. In the other instances in which discipline was imposed, management at National asked Erie to issue a worker warning report specifying a particular penalty (e.g. a three day suspension) and Erie then imposed the requested discipline. Even though Ms. Rice testified that these requests were simply suggestions to Erie concerning discipline, the evidence indicates that Erie recruiters generally responded to these requests by issuing the requested worker warning report to the driver or pitcher in question. Erie also complied with National's requests not to assign a particular worker to National again on an indefinite basis.

68. In the Board's view, the evidence in the present case does not support the suggestion of National that Ms. Rice was simply playing a more active role in managing the Stoney Creek yard than she was authorized to do when she disciplined drivers and pitchers directly. Instead, the evidence indicates that Ms. Rice as well as National's two route supervisors imposed discipline on drivers and/or pitchers from time to time and there is little evidence to suggest that Ms. Rice or the two route supervisors were ever reproached for having done so.

69. The present case is not therefore, in the Board's view, comparable to that in *Nolisair International Inc. (Nationair Canada) et al.*, 89 di 94 (CLRB No. 960), in which some supervisors of the personnel agency's client, Nationair, were found to have played a more active role in supervising the flight attendants supplied to it by the personnel agency, Solair, because of the personality of the individual supervisors concerned. The situation before the Board in *Nolisair International Inc. (Nationair Canada) et al.*, cited above, in which the Board found that Solair was the employer for labour relations purposes is also distinguishable from that before the Board in the present case in that Solair, the entity which supplied the flight attendants to Nationair, unlike Erie, had its own supervisory personnel on site, who were responsible for assigning duties to the individuals assigned to the client. In addition, the evidence in that case, unlike that in the present one, did not establish that discipline during the relevant period was meted out at the request of the client.

70. With respect to the issue of authority to dismiss drivers and pitchers, there is no doubt that National only had the right to decline the assignment of a particular driver or pitcher and could not terminate that individual's contract with Erie. National also correctly points out that the removal of a driver or pitcher from assignment to National altogether or for the period of a suspension does not amount to a termination of his or her employment with Erie, given that Erie can continue to assign those individuals to other clients. However, as term and task employees, those drivers and pitchers are only entitled to be compensated for hours actually worked and therefore they presumably lost wages if not permitted to work at National for a period of days or indefinitely unless assigned elsewhere. Given the absence of any specific evidence that a particular driver or pitcher actually worked for Erie's other clients and the fact that drivers and pitchers assigned by Erie are only paid for hours worked, National's decisions to suspend, or to refuse the assignment of, a particular driver or pitcher would negatively affect the individuals concerned.

71. In all the circumstances, the Board finds that the factors of authority to dismiss and the imposition of discipline point more strongly to National as the employer.

The Perception of the Employees

72. Mr. Colette and Mr. Anderson were the only two drivers who testified. Mr. Colette indicated that he regarded National as his employer because it was National's yard, because they were to phone National if they were not coming in, because he punched in and out at National every day, because he was supervised by National's supervisors and drove National's trucks, and because all of the paperwork he was required to complete had National's name on it. Mr. Anderson similarly testified that he considered National to be his employer since it was National's yard, because he punched into National's time clock, and because he never really did anything with Erie. Mr. Anderson, like Mr. Colette, spoke to Ms. Rice when he wanted time off.

73. Other indications in the evidence however point to their recognition that Erie purports to be their employer and that Erie is responsible for such things as workers' compensation and payroll issues. For example, Mr. Colette knew that he had to deal with Erie about issues concerning his workers' compensation claim and regarding requests for modified work. As such, while their direct evidence points to their perception of National as their employer, the evidence taken as a whole is equivocal in that regard. In addition, as noted in the Board's jurisprudence, this type of evidence is often self-serving and inherently unreliable.

74. In all the circumstances, the Board finds that this factor, albeit pointing more strongly to National than to Erie as employer, carries little weight in the overall assessment.

The Intention to Create an Employment Relationship

75. There can be no doubt from the evidence that the intention of both National and Erie was that drivers and pitchers assigned to National were to be term and task employees of Erie.

76. This is evident from Erie's employment application form and from the offer of employment letters provided to drivers and pitchers placed at National as well as from the fact that Erie is the one who pays the employees either by direct deposit or by cheque, deducts and remits taxes and other source deductions on their behalf and deals with any workers' compensation ("WSIB") matters that arise. This is also evident from the fact that Erie is the one who asks drivers and pitchers to sign an averaging of overtime agreement and an extra hours of work agreement for employment standards purposes. Erie also conducts health and safety meetings from time to time for drivers and pitchers placed at National. In addition, the terms of the agreement between Erie and National entered into in February 2006 explicitly states that "[t]he employee dispatched to your Company is the employee of Erie Personnel Corporation and matters relating to their employment shall be reported to Erie Personnel Corporation."

77. This factor points to Erie as the employer.

Assessment of Fundamental Control

78. In the present case, the only factor that points to Erie as the employer is the intention to create an employment relationship. However, as noted in *533670 Ontario Ltd. (c.o.b. Best Personnel Services)*, cited above, the consideration of the intention to create an employment relationship is generally accorded less weight than the other factors because of the Board's concern about substance over form. As such, the fact that Erie enters into a written employment agreement with drivers and

pitchers as elect to work employees is by no means determinative of the substance of the triangular relationship between the employees, the personnel agency and the client.

79. In the Board's view, the situation in the present case bears significant resemblance to that before the Canada Industrial Relations Board ("CIRB") in *Mackie Moving Systems Corporation,* [2002] CIRB no.156 (January 23, 2002), in which the CIRB found that the respondent, Mackie, was the employer for labour relations purposes of the drivers supplied to it by various personnel agencies. In *Mackie Moving Systems Corporation,* cited above, the CIRB summarized its findings concerning the relevant factors, as follows:

> [160] The Board is of the view that the case *Pointe-Claire (City) v. Quebec (Labour Court), supra,* contrary to the suggestion in argument is analogous to the aspect of the current case that deals with agency drivers, and finds, taking a comprehensive view and considering the relevant factors from a broad perspective, that the employer exercising fundamental control with respect to the agency drivers assigned to it is Mackie. The facts are clear: Mackie *inter alia* has the effective final say in hiring: it determines if an agency driver will be let go or retained; it effectively determines their level of remuneration; importantly Mackie determines and controls all of the day-to-day elements that surround the performance of their work: the number of hours they work, how their work is to be performed, the location for pick-up and delivery and all of the many aspects noted above. Mackie generally owns the equipment used by the drivers to carry out their functions and all communications during the work day are with Mackie. The employment with Mackie is generally indeterminate and the employees identify with Mackie. Taking a balanced view of these and the other relevant factors outlined previously above, the employer exercising fundamental control of the employees in question on a careful consideration of all the circumstances is Mackie.

In that case, like the present one, the personnel agencies paid the drivers but the cost of their wages was borne by the client, Mackie, and the day to day supervision of the drivers was also done by the client. In addition, even though the agencies, like Erie, were responsible for such things as recruitment, screening, initial testing such as ensuring valid commercial drivers' licenses, current drivers' abstracts, testing for general driving knowledge and reference checks, once referred to the client, Mackie, like National, gave the driver a road test and required the new driver to undergo special training. Mackie, like National, therefore had the final say as to whether an agency driver will be accepted or not. The fact that Mackie used several agencies to supply drivers to it did not further affect the CIRB's determination that Mackie exercised fundamental control over the various elements essential in constituting an employer-employee relationship with the agency drivers.

80. The situation in the present case also points more clearly to the client, National, as the true employer than was the case in either *Mackie Moving Systems Corporation,* 2004 CanLII 23808 (ON L.R.B.) (February 4, 2004) or in *Lantic Sugar Ltd.,* [2004] OLRB Rep. January/February 69 (February 11, 2004), in which the Board found that the client, rather than the personnel agency in question, was the true employer of the drivers supplied to it.

81. In *Mackie Moving Systems Corporation*, cited above at para. 80, the client, Mackie, played no part in the selection or hire of the Lear run drivers assigned to it but, like in the present case, no driver could work for Mackie unless he passed its road test. As such, Mackie, like National,

performed a final screening function in the recruitment process. In determining that Mackie was the *de facto* employer, the Board summarized its assessment of the relevant factors, as follows:

> 88. In summary, Mackie exercised significant, but not exclusive, day-to-day control and direction of the Lear run workforce. Adams played the dominant role in recruitment, but Mackie could screen out drivers who did not satisfy Mackie of their driving skills or their appreciation for safety. For the most part, Adams carried out the function of disciplining and terminating the drivers, but Mackie's contractual leverage *vis-à-vis* Adams (approximately 25 per cent of Adams' total complement of drivers were engaged on the Lear run, and in the neighbourhood of 70 per cent in Mackie's operation overall) meant that it was in a position to influence discipline and discharge decisions where it saw fit. Mackie gained the work in question, which was carried out by the Lear run drivers for Mackie's benefit. There was no evidence that, but for the Lear run, the drivers who served that project would have been otherwise recruited by Adams. Mackie bore the real burden of remunerating the drivers, although the pay cheques, and other typical employment documentation were handled and issued by Adams. Accordingly, notwithstanding that Adams and Mackie intended, and endeavoured to organize their affairs in a manner consistent with, an employment relationship between Adams and the drivers, for purposes of the Act, Mackie was the *de facto* employer.

The circumstances of the present case are similar except that in *Mackie Moving Systems Corporation,* cited above at para. 80, there was a sharing of day-to-day direction and control of the Lear run drivers as between Mackie and Adams. For example, Adams allocated particular driving assignments to the drivers according to driver preferences and both Adams and Mackie played a role in setting standards and correcting performance. In that case, the Board found that Mackie was the *de facto* employer notwithstanding that day-to-day direction and control in that case did not clearly suggest who the employer was, that Adams played a significant role in recruitment, that all of the typical employment documentation was handled by Adams, and that Adams intended to create an employment relationship with the drivers.

82. Similarly, in *Lantic Sugar Ltd.*, cited above, the Board found that the client, rather than the personnel agency, was the true employer of the drivers in question despite evidence of considerably more involvement by Advantage, the personnel agency in that case, in the day-to-day supervision of drivers and also in the recruitment of drivers than there is involvement by Erie in the present case. In that case, Advantage was, like Erie, a well-established temporary personnel supply business. Advantage had been in business for approximately 15 years, had approximately 300 to 325 clients, and operated out of twelve locations in six provinces and also supplied personnel who perform a range of services including clerical, factory labour and driving. However, in that case, Advantage's Safety and Compliance Officer performed many of the same functions, which National's route supervisors perform, such as giving road tests to drivers, doing spot checks, training and disciplining if necessary and doing accident investigations. Even though Advantage was found to be more than a mere paymaster, the Board concluded that Lantic had more say in the day-to-day working lives of the drivers and that Lantic retained the right to discipline them and to have them removed from the contract. Having regard to all of the evidence, the Board concluded that Lantic exercised fundamental control over the drivers for the purposes of the Act and was the drivers' employer.

83. The Board cannot further agree with the suggestion in argument that all of the cases relied upon by the union are distinguishable in that none had evidence of a formal employment relationship

having been created between the agency and the worker prior to the assignment of the worker to the client. For example, in *Lantic Sugar Ltd.*, cited above, the evidence was that drivers signed a "contract assignment policy" with Advantage if hired, which document noted that the assignment with the client may be terminated at any time without notice and in that event the driver's employment with Advantage would be changed to available temporary assignments with other clients. The evidence in that case was also that the drivers who were removed from the Lantic account had been assigned by Advantage to other clients whereas in the present case there is little evidence to indicate that specific drivers or pitchers worked for other clients of Erie.

84. Further, in the Board's view, these relatively recent decisions referred to above, which all involve drivers supplied by personnel agencies, bear greater similarity to the circumstances of the present case and better reflect the Board's current approach than do the much older Board decisions in *Templet Services,* [1974] OLRB Rep. Sept. 606 and in *Tower Company (1961) Ltd.,* [1979] OLRB Rep. June 583, which concerned construction and maintenance employees respectively, rather than drivers, supplied by personnel supply agencies.

85. While National argues that the factor of who does the hiring should be accorded more weight in the present case given the high amount of turnover, the Board finds that factor to be neutral given the shared responsibility for hiring done by National and Erie. In all the circumstances, the Board is not persuaded that it should conclude that fundamental control over the drivers and pitchers rests with Erie simply because of Erie's significant, albeit shared, role in recruitment, orientation and training.

86. Finally, the Board's determination that National exercises fundamental control over the working conditions of the drivers and pitchers for the purposes of determining who the true employer is under the Act is not altered by the recent changes made to the *Employment Standards Act, 2000,* S.O. 2000, c.41, as amended (the "ESA") under Bill 139, an Act to amend the Employment Standards Act, 2000 in relation to temporary help agencies and certain other matters. Those changes, which make the temporary help agency the employer of a person assigned to perform work for clients of the agency for the purposes of the ESA, do not come into force until six months after May 6, 2009, the date the Bill received Royal Assent.

87. The issue before the Board in this case concerns whether National is the true employer of the drivers and pitchers to whom the application under the Act relates. That question involves an assessment of which entity affected the most control over all aspects of their work in an effort to ensure that collective bargaining contemplated under the Act will be meaningful. The fact that the recent legislative changes to the ESA will deem the agency to be the employer for an employee's minimum entitlements under the ESA six months from the date of Royal Assent does not alter the Board's overall assessment of who exercised fundamental control over the working lives of the drivers and pitchers at the time the certification application was filed. It is further well-established that a determination of who is the true employer for labour relations purposes may differ from a determination of who is the true employer under other statutes (e.g. for income tax purposes, etc.).

88. In any event, had the legislature wanted to ensure that collective bargaining is done by the same entity which will have the employment standards obligations for temporary help agency workers, it could have amended the Act at the same time that it introduced changes to the ESA. The legislature however chose not to do so, despite the fact noted by the Supreme Court of Canada in *Pointe-Claire (City) v. Quebec (Labour Court)*, cited above, that the Board in applying the applicable

fundamental control test has generally concluded that the client is the temporary employee's real employer. In addition, as recently noted in *PPG Canada Inc.*, [2009] O.L.R.D. No. 1099 (March 27, 2009) and previously adverted to in *Nike Canada Ltd.*, [2006] O.L.R.D. No. 2482 (July 17, 2006) at paragraph 59, there may be occasions where the triangular relationship between employee, client and personnel agency is such that the agency and the client may be found to be a single employer under the Act where an application under section 1(4) of the Act is made.

89. For all these reasons, the Board concludes that National was the employer of the drivers and pitchers who are the subject of this application at the relevant time.

Disposition

90. Having regard to the agreement of the parties and the Board's determination herein, the Board finds that the following constitutes a unit of employees of the responding party appropriate for collective bargaining:

> all employees of National Waste Services Inc. in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, and office, clerical and salaried employees.

91. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

92. A certificate will issue to the applicant.

93. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

94. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "notice of Vote and of Hearing" posted previously. These copies must remain posted for thirty (30) days.

3598-08-R; 3599-08-R International Union of Operating Engineers, Local 793, Applicant v. **Niacon Limited**, Responding Party v. Labourers' International Union of North America, Ontario Provincial District Council, Intervenor; Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. Niacon Limited, Responding Party v. International Union of Operating Engineers, Local 793, Intervenor

Certification – Construction Industry – Practice and Procedure – The OPDC filed with the Board its challenges to 12 of the 18 individuals the employer had listed as being employees in the bargaining unit, but failed to deliver the letter to the employer – The employer, referring to the Board's direction in its decision (and Information Bulletin #9), asserted that as the OPDC had not delivered its challenges, the list of employees was settled – The Board noted that neither its direction nor the Information Bulletin sets out any

consequences for a failure to comply; that the purpose of the requirement was to prevent gerrymandering; that the employer did not suggest it was prejudiced by not receiving the OPDC's challenges (as the employer was notified about the challenges prior to the Regional Certification Meeting and replied to them) – Accordingly there was no legitimate basis for finding the OPDC's failure to notify the employer in a timely fashion precluded the OPDC from pursuing its challenges – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD: June 30, 2009

1. These are two applications for certification made under the construction industry provisions of the *Labour Relations Act, 1995*, S. O. 1995, c. 1 as am. (the "Act") being dealt with under section 128.1 of the Act. These two applications were each filed on March 7, 2009.

2. The Board by decisions dated March 17, 2009 in each of these two applications determined the description of the appropriate bargaining units and referred each of these applications to the Manager of Field Services to conduct Regional Certification Meetings because the Board was not able to determine, based on the material filed, the percentage of employees in each of the bargaining units who were members of each applicant on the date the application was filed. The Regional Certification Meeting in each of these applications was convened on April 8, 2009.

3. The Labourers' International Union of North America, Ontario Provincial District Council (the "OPDC") filed an intervention on April 15, 2009 in the application in Board File No. 3598-08-R. The International Union of Operating Engineers, Local 793 (the "IUOE") filed an intervention on April 14, 2009 in the application in Board File No. 3599-08-R.

Board File No. 3598-08-R

4. The responding party asserted it had no employees at work in the IUOE bargaining unit (operating engineers) on the application date. The IUOE claimed there were four employees at work in the bargaining unit. The responding party, in the alternative, submitted it had six employees performing similar work, and if any one of those six persons is considered to having been doing bargaining unit work on the application date, then all six individuals should be included in the bargaining unit.

5. The IUOE challenged four persons who the responding party claims were its employees but who were not engaged in bargaining unit work on the application date: Mike Brazeau, Mike Crosby, D. Ralph Edwards and Mark Mudford.

6. The responding party submitted that if Messrs. Brazeau, Crosby, Edwards and Mudford were in the bargaining unit on the application date, then so too were Brian Johnson and Chris Milkovech.

7. The IUOE submits Messrs. Johnson and Milkovech were not at work and did not perform any bargaining unit work on the application date. The IUOE, in addition, submits Mr. Milkovech was not an employee of the responding party.

8. The OPDC intervened in the IUOE application in Board File No. 3598-08-R to ensure the dispute relating to the status of Mr. Brazeau does not affect the agreement between the responding party and the Labourers in the application in Board File No. 3599-08-R in which those two parties agreed Mr. Brazeau was an employee in the bargaining unit of construction labourers being dealt with in that application.

9. The status of Mr. Brazeau, while not an issue in the Labourers' application in Board File No. 3599-08-R, is an issue in the IUOE application. Since the IUOE was not a party to the agreement between the responding party and the Labourers with respect to the status of Mr. Brazeau, their agreement is not binding on the IUOE and therefore the Board must determine, unless all parties agree, whether Mr. Brazeau was employed in either the IUOE's or the Labourers' bargaining unit on the application date.

10. The Board in *Graham Bros. Construction Limited*, [2009] OLRB Rep. March/April 234 (February 4, 2009), app. for judicial review dism'd., [2009] O.J. No. 2079 (May 20, 2009) made the following comments at page 242 relating to status disputes concerning the same individuals in two certification applications in respect of the same employer made the same day by two different unions who the employer claimed were in both bargaining units on the application date:

> 40. The Board considers "the time that the application was filed" as being the date on which the application was filed. An employee is considered to be in a bargaining unit "at the time that the application was filed" if they spent a majority of their working time on the application filing date engaged in bargaining unit work. If one must spend a majority of their day engaged in one type of work in order to fall within a particular bargaining unit in the construction industry it simply follows that one can only be in one bargaining unit on the application filing date.
>
> 41. Where two applications for certification are filed on the same date, and all of the parties have agreed, or the Board has found, an individual to be in one of the two bargaining units, if the Board is then asked to decide whether that same individual was also in the second bargaining unit on the same date, the Board will almost certainly decline to permit a result that has the person in both bargaining units. That is because the Board will know that, at the end of the inquiry, it could potentially be asked to make a determination as to the level of both unions' membership support based on the employee being in both bargaining units.

It is clear therefore that the Board's determination of Mr. Brazeau's status in the IUOE application must be relevant to his status in the OPDC application in Board File No. 3599-08-R and to that end, the OPDC is entitled to intervene, at the very least, to least to deal with the issue relating to Mr. Brazeau's status.

11. Both the IUOE and the responding party seek an order directing production of documents prior to the hearing which will be scheduled in this matter. The IUOE requests production of the responding party's records relating to the status disputes. The responding party requests the IUOE produce photographs and videos taken during the work week the application was made, "notes, diaries, correspondence and similar or related documents pertaining to the Responding Party and the work that includes the application date of March 7, 2009", and any other documents on which the IUOE intends to rely at the hearing.

12. The responding party, in reply to the applicant's request, advised it would produce time sheets and payroll records in respect of the work week in which the application was made together with any other documents on which it intends to rely at the hearing. Thus, there is no need to address the IUOE's request for a production order.

13. There is nothing in the material filed by the parties to indicate whether the IUOE is prepared to produce any or all of the documents sought by the responding party. While I have concern about the request in relation to the IUOE's notes and correspondence, it seems to me that if the IUOE has photographs or videos relating to the work done by the responding party's employees on the application date, those documents should be made available to the responding party prior to the hearing, together with all documents on which the IUOE intends to rely. At this stage, the Board is not going to order production of those documents since none of the parties have renewed their request for a production order in their recent submissions.

Board File No. 3599-08-R

14. The OPDC claimed there were five employees at work in its bargaining unit (construction labourers) on the application date. The responding party asserted it had 18 employees doing the work of a construction labourer on the application date. The OPDC and the responding party referred to the same project where the responding party was working on the application date.

15. The OPDC by letter dated March 23, 2009 and filed with the Board on that date initially challenged 12 of the 18 individuals the responding party had listed as being employees in the bargaining unit on the grounds they were not at work in the bargaining unit on the application date. That March 23rd letter had not been delivered to the responding party when the OPDC filed it with the Board.

16. The responding party by letter to the Board dated March 31, 2009 pointed out it had not received notice from the OPDC about any challenges to the list of employees it had filed. The responding party referred to the Board's direction to the OPDC contained in the March 17th decision to deliver its challenges to the list within five days from the date of that decision. The responding party asserted that as the OPDC had not delivered its challenges, the list of employees was settled. The OPDC on that same day advised the Board it had filed its challenges in accordance with the Board's direction, but through inadvertence, had neglected to deliver the challenges to the responding party. It provided the responding party with its list of challenges, and the responding party, in response, disputed the OPDC's right to pursue those challenges.

17. The responding party refers to Information Bulletin No. 9 and the direction contained in the Board's March 17th decision to assert the OPDC had failed to meet the requirements established by the Board for challenging the employee list filed by the responding party. It submits the failure to comply with the direction made by the Board should result in the Board refusing to permit the OPDC from continuing with its challenges and the Board should therefore treat the list of employees filed by the responding party as being settled.

18. The responding party relies on the following paragraph in Information Bulletin No. 9:

> Where there is a dispute about the employees listed (or not listed) on Schedule A, the union is usually directed to deliver to the employer and file with the Board its

> challenges (including any additions) to Schedule A no later than five (5) days from the date of the Board's decision directing a Regional Certification Meeting. The employer is to deliver to the union and file with the Board its position in reply to each of the union's challenges (including any proposed additions) within ten (10) days of that decision. Once the union has responded to Schedule A, neither party will be permitted to add to, or delete from, the list without agreement of the parties or leave of the Board. A Regional Certification Meeting will follow.

Neither the Board's March 17th decision making the direction nor Information Bulletin No. 9 sets out what consequences might result from a failure to comply with that direction. The decision issuing the direction is silent on that issue while Information Bulletin No. 9 simply refers to the "usual direction" issued by the Board.

19. There was nothing in either the Board's March 17th direction or Information Bulletin No. 9 to suggest the OPDC, by failing to deliver its challenges to the responding party was agreeing with the list of employees the responding party had filed with its response.

20. Moreover, the purpose behind requiring both the applicant and responding party well before the Regional Certification Meeting to set out their positions (but not the reasons for their positions) in respect of the employee list is to facilitate the parties' discussions at that meeting and to prevent "gerrymandering" of the list. It is in an applicant union's interest to identify and notify a responding party of its challenges to the list promptly. Once a responding party learns who the applicant challenges, the Board would not normally permit the responding party to subsequently challenge an individual on the list it had filed with its response. See, for example *Nathan Reid Homes Ltd.*, decision dated October 10, 2008, Board File No. 1439-08-R, unreported, 2008 CanLII 56632 at paragraph 20 where the Board wrote:

> If the responding parties desired to pursue the question of whether these three individuals were truly its employees on the application filing date but were constrained by the limited statutory two day response time, they ought to have stated clearly in their response that the names of the three individuals had been included on the Schedule "A" list out of an abundance of caution, and that they desired to maintain the alternative argument that the three individuals were not their employees. Most importantly, once the applicant disclosed at the Regional Certification Meeting who it asserted should be on the list of employees, it was too late for the responding party to assert this alternative position.

21. I also note the responding party did not suggest, nor would there likely be a legitimate basis for doing so, it was prejudiced by not receiving the applicant's challenges in a timely fashion. The OPDC notified the responding party about its twelve challenges before the Regional Certification Meeting, and the responding party replied to those challenges. There is therefore no legitimate basis for finding the OPDC's failure to notify the responding party of its challenges within the time established by the Board's direction precludes the OPDC from pursuing its challenges to the list.

22. In the result, the request by the responding party to have the Board refuse to consider the challenges to the list made by the OPDC is dismissed.

23. The OPDC in its March 17th letter filed with the Board and subsequently sent to the responding party notified the responding party it was challenging the following twelve persons on the grounds that they were not at work in the bargaining unit on the application date:

1. James Cimenti
2. Mike Cosby
3. Brian Dickle
4. Andrew Dzumbelak
5. Peter Dzumbelak
6. (Douglas) Ralph Edwards
7. Dave Hughes
8. Radek Krochmaiski
9. Mark Mudford
10. Derek Porada
11. Kevin Sider
12. Bogdan Tymczak

It maintained those challenges at the Regional Certification Meeting. The parties did agree that six of the 18 persons on the responding party's list were in the bargaining unit, including Mike Brazeau.

24. The IUOE filed an intervention in this application. As indicated above, the agreement between the OPDC and the responding party with respect to Mr. Brazeau being an employee in the bargaining unit of construction labourers is not binding on the OPDC. Whether Mr. Brazeau was employed as a construction labourer or operating engineer will be determined by the Board at the hearing of this matter, unless the three parties agree on his status.

25. The OPDC and the responding party filed their submissions following the Regional Certification Meeting. The OPDC in its post meeting status submissions asserted the following 9 persons were not at work in the bargaining unit for a majority of their working day on the application date, were not at work in the construction industry and were not employees of the responding party:

1. James Cimenti
3. Brian Dickle
4. Andrew Dzumbelak
5. Peter Dzumbelak
7. Dave Hughes
8. Radek Krochmaiski
10. Derek Porada
11. Kevin Sider
12. Bogdan Tymczak

The OPDC asserted those nine individuals were not at work at the responding party's construction site on the application date. It submits that a majority of those nine persons work for a millwork company, Niagara Millwork Inc. which is owned by the same principals who own the responding party. The OPDC submits Niagara Millwork Inc. operates a millwork shop where carpenters are employed, but who are not working in the construction industry. The OPDC submits that of those nine individuals, Mr. Krochmaiski works in the responding party's office, while Messrs. Cimenti,

Dickle and Hughes were supplied by an employment agency to work for the responding party, but were not at work at the project on the application date, or if they were at the project, were not engaged in bargaining unit work.

26. The responding party in its submissions filed after the Regional Certification Meeting asserted that the nine individuals about whom the OPDC made submissions are employees who were working as construction labourers on the application date. The responding party noted the OPDC had not filed any submissions with respect to Mike Cosby, (Douglas) Ralph Edwards and Mark Mudford. The responding party submitted that in the absence of any submissions from the OPDC about their status, the Board should find they are no longer in dispute and therefore should be found to be employees in the bargaining unit. The OPDC did not file any submissions in reply to that submission.

27. The Board need not determine at this stage of the proceeding whether the OPDC, by failing to make submissions in respect of Messrs. Cosby, Edwards and Mudford, has accepted they are employees in the bargaining unit of construction labourers as of the application date, or whether it is prepared to accept the assertion made by the IUOE that those three individuals were in the bargaining unit of operating engineers. Even if the OPDC has dropped its challenge to those three persons, their status remains in dispute given the position taken by the IUOE that they are employees in the bargaining unit it seeks to represent.

28. It appears to me the parties should first deal with the status of Mike Brazeau, and then with the status of the Messrs. Cosby, Edwards and Mudford. Since the IUOE asserts those four persons were employees in the bargaining unit of operating engineers, it must secure their attendance at the hearing.

29. The Board refers these two applications to the Registrar to be listed together for two days of hearing initially for the purpose of receiving the parties' evidence and representations with respect to the status of Messrs. Brazeau, Cosby, Edwards and Mudford. The manner in which the Board will hear and determine the balance of the status disputes is a matter to be dealt with by the panel of the Board assigned to hear these two applications.

30. This panel of the Board is not seized with these two applications.

0275-09-HS; 0276-09-HS; 0307-09-HS PCL Constructors Canada Inc., Applicant v. Labourers' International Union of North America, Local 247, Labourers' International Union of North America, Ontario Provincial District Council; Sheet Metal Workers International Association, Local Union 269; Ontario Sheet Metal Workers' & Roofers' Conference, and Kevin Kealey, Inspector, Responding Parties; Labourers' International Union of North America, Local 247, Applicant v. PCL Constructors Canada Inc., and Kevin Kealey, Inspector, Responding Parties

Health and Safety – PCL and the Labourers both sought suspension of an Inspector's orders requiring that only qualified sheet metal workers conduct the dismantling of certain heating and air conditioning materials as part of a hospital demolition – The Sheet Metal

Workers Union had complained to the Ministry of Labour that the work was being carried out by persons without appropriate qualifications and therefore in violation of the OHSA and the *Trades Qualification and Apprenticeship Act* – The Board noted that there is a jurisdictional dispute involving the same parties arising from the same fact situation currently before it – The Board found that PCL and LIUNA have pleaded a strong *prima facie* case for success on the merits of the appeal; the usual reasons for deference to the inspector are absent in this case; there is no threat to the health and safety of workers; operational or institutional prejudice may be present for some of the parties, but the prejudice is not significant – Suspension granted

BEFORE: *David A. McKee*, Vice-Chair.

DECISION OF THE BOARD: May 7, 2009

1. Board File Nos. 0276-09-HS (the "PCL application") and 0307-09-HS (the "Labourers' application") are applications pursuant to section 61(7) of the *Occupational Health and Safety Act*, R.S.O. 1990, c.O-1 as amended (the "Act") seeking the suspension of orders issued by Inspector Kevin Kealey in Field Visit Number 6020889 dated April 23, 2009. PCL Contractors Canada Inc. ("PCL") has also filed an appeal of the order which has been assigned Board File No. 0275-09-HS.

2. By decision dated April 30, 2009, the Board abridged the time for the filing of responses in Board File No. 0276-09-HS to 5:00 p.m. on May 5, 2009. At that time, the Board was not aware of the Labourers' application. The latter application is now before me, but it was not possible to determine all of the relevant applications until after May 5, 2009.

3. The Board has received numerous and lengthy submissions from the parties listed below. The essential facts are not significantly in dispute, although there are factual differences that do not need to be resolved here. The facts giving rise to the issuing of the order by Inspector Kealey appear to be as follows.

4. PCL has a contract to perform work in connection with the multimillion dollar redevelopment of the Kingston General Hospital ("KGH"). The work is being performed while KGH is in operation. The work PCL is contracted to perform includes the demolition of part of the hospital building. A portion of that part of its contract includes the demolition, tear out, removal and disposal of HVAC materials. The demolition work takes place after the mechanical systems have been capped off by members of the Sheet Metal Workers International Association Local 269 ("the Sheet Metal Workers"). The materials removed are not for reuse. The work involves the removal of asbestos. PCL subcontracted the work to Envirocan Abatements Ltd. ("Envirocan") who employs members of the Labourers' International Union of North America, Local 247 ("Labourers") to do the work. Envirocan specializes in demolition work including the removal of designated substances such as asbestos.

5. The Sheet Metal Workers filed a complaint with the Ministry of Labour asking that an investigation be conducted into whether PCL's assignment of the demolition work at KGH was in violation of the *Occupational Health and Safety Act* ("OHSA") and the *Trades and Qualifications and Apprenticeship Act* ("TQAA") and/or its associated Regulations. Subsequently, PCL filed a Notice of Jurisdictional Dispute pursuant to section 99 of the *Labour Relations Act, 1995* with the Ontario Labour Relations Board (Board File No. 3223-08-JD) asking the Board to determine whether the Labourers or the SMW's have jurisdiction over the demolition work. A pre-hearing consultation

has taken place in connection with that matter and the consultation is scheduled to take place on September 24, 2009. PCL, the Sheet Metal Workers and the Labourers are all parties to the jurisdictional dispute and are participating in it. The application of the O/Reg. 1077/90 is a significant issue in that case.

6. The orders issued by Inspector Benoit are as follows:

> Order 1. PCL Constructors Canada Inc. shall ensure that all work that falls under training requirements for certain skill sets and trades (O. Reg. 572/99) under the Occupational Health and Safety Act is complied with. The Trades Qualification and Apprenticeship Act establishes the trade regulations. (O. Reg. 1077, R.R.O. 1990.) Sheet Metal Worker defines a "Sheet Metal Worker" as a person who manufacturers, fabricates, assembles, handles, erects, installs, dismantles, reconditions, adjusts, alters repairs or services all ferrous and nonferrous sheet metal of no. 10 U.S. gauge or of any equivalent or lighter gauge and all other materials used in lieu thereof. Schedules I and II of the Regulation (Sheet Metal Worker – in school training and work experience training) contain components to meet health and safety training as well as other related technical requirements of the certified trade. Only workers authorized as Sheet Metal Workers are able to dismantle and hand the sheet metal material.
>
> Order 2. Workers from Envirocan Abatements Inc. shall not carry out work in a schedule trade unless authorized under the Trades Qualification and Apprenticeship Act to work in that trade. Sheet metal dismantling and handling must be done by authorized sheet metal workers.
>
> Order 3. Envirocan Abatements Inc. shall cease to have workers dismantle or handle sheet metal material unless they are authorized sheet metal workers under the Trades Qualification and Apprenticeship Act.
>
> Order 4. The trade regulation (O. Reg. 1077, R.R.O. 1990) for Sheet Metal Worker defines a "Sheet Metal Worker" as a person who manufacturers, fabricates, assembles, handles, erects, installs, dismantles, reconditions, adjusts, alters repairs or services all ferrous and nonferrous sheet metal of no. 10 U.S. gauge or of any equivalent or lighter gauge and all other materials used [in lieu] thereof. Schedules I and II of the Regulation (Sheet Metal Worker – in school training) contain components to meet health and safety training requirements for the certified trade. Only workers authorized as sheet metal are able to dismantle and handle this sheet metal material.

7. In dealing with a request to suspend on order, the Board's approach is set out succinctly in *The Regional Municipality of Hamilton-Wentworth*, [1998] OLRB Rep. Aug. 709:

> Three factors have generally been considered by the Board when determining whether a suspension of an order is appropriate in the circumstances:
>
> (a) whether the suspension of the order (or, alternatively, the failure to suspend the order) would endanger worker safety;
>
> (b) the prejudice to the parties if the order is or is not suspended; and

> (c) whether there is a strong *prima facie* case for a successful appeal of the order.
>
> It is fair to say that the onus lies upon the party desiring the suspension order to establish that such an order ought to issue. Furthermore, the decision of Adjudicator Herman in *General Motors of Canada Limited* (File No. 3666-96-HS, decision dated June 2, 1997) stands for the proposition that a certain degree of deference must be afforded to decisions made by inspectors for the purposes of considering the suspension of these orders pending their appeal. In the absence of some persuasive reason to interfere with that order pending the hearing of the appeal on the merits, the original order should not be suspended.

8. The Board has considered the extensive submissions from PCL, the Labourers, the Sheet Metal Workers, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local 269 and the Inspector. The Ontario Sheet Metal and Air Handling Group has asked to intervene but has not filed formal submissions. I have considered all of these submissions carefully, although the expeditious nature of a suspension request does not make it possible to deal with each of the arguments in detail. I conclude that I will exercise the Board's discretion to suspend the order for the following reasons.

Strong Prima facie case

9. I conclude that PCL and the Labourers have established a strong prima facie case. Without adopting the Labourers' assertion that "dismantling" refers only to "live systems" I conclude that there is very likely a distinction to be made for the purposes of the trade of a Sheet Metal Worker between the dismantling of a mechanical system that involves sheet metal work and the demolition of a building or part of a building which contains, among other things, an air handling system. The trade of a Sheet Metal Workers is defined in the Regulation 1077/90 as:

> sheet metal worker" means a person who,
>
> (a) manufactures, fabricates, assembles, handles, erects, installs, dismantles, reconditions, adjusts, alters, repairs or services all ferrous and nonferrous sheet metal work of No. 10 U.S. Gauge or of any equivalent or lighter gauge and all other materials used in lieu thereof, and
>
> (b) reads and understands shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches or a person who fabricates or installs metal cladding over insulation.

10. Read in the context of the entire regulation, the word "dismantles" takes on a different meaning than it does in isolation. Indeed, even one dictionary's definition of dismantle, ("to take to pieces") as opposed to demolish, (defined as "to pull down (a building), to completely destroy or break") suggest a very different context for the work.

11. More significantly, the words must be given meaning in the context to the work that various trades do. This work is demolition work; it is not the construction, repair, alteration or modification of a mechanical system. It is not necessary to come to a final conclusion on this matter, simply to conclude that PCL has advanced a strong prima facie case.

12. The Sheet Metal Workers assert, quite correctly, that on a suspension application, the Board will give deference to the view of an Inspector. This is generally because the Inspector is the person on the site who has first hand knowledge of the situation, is a person with considerable expertise, and who is in a better position than the Board to assess the risks of a particular job site. Those considerations do not apply here, since the argument is one that relates to the interpretation of a regulation rather than assessment of the hazards of a particular job site. While I am still prepared to accord the Inspector some deference (for instance I assume that the work that the Inspector examined could fit within some definition of "dismantle") the usual reasons for deference are absent.

Worker Safety

13. I am not persuaded that the safety of the workers on the project will be endangered if the Order is suspended. I agree that the asbestos removal issue is, as the Inspector asserts, a red herring. Whoever does the work must have the requisite training to handle asbestos and that is true of all trades. I cannot and do not need to determine whether there are sufficient numbers of sheet metal workers with the appropriate training who would be available to perform the work. However, the Board cannot ignore that fact that the vast majority of demolition work in the province is not performed by sheet metal workers.

14. In addition, it is important to recognize that the removal of the HVAC system is part of a larger demolition project. Demolition work is an inherently dangerous occupation. Some of the highest rates of Workplace Safety and Insurance premiums are paid in respect of such work. The addition of one or more sheet metal workers concerned exclusively with the removal of the HVAC system, while working in and around others demolishing the rest of the building, creates an additional risk factor of some degree. Assuming that the performance of this work by certified sheet metal workers adds to the safety of the job, that additional safety must be balanced against the increased risk associated with the enforcement of the order. I cannot determine the exact nature of either one, but this consideration reinforces my conclusion that the safety of workers will not be endangered by the suspension of the Order.

Prejudice to the Parties

15. There is some operational prejudice to PCL in refusing to suspend the order, although that is not a significant factor in these circumstances. However, there is no prejudice to any other party. There may be some institutional prejudice to the Sheet Metal Workers as a trade union if the Order is suspended (just as there would be the same degree of prejudice to the Labourers if it were not suspended), but that is not a consideration in an application to suspend under this Act.

Other

16. This appeal and the submissions filed do tend to lend credence to PCL's assertion that this is really a jurisdictional dispute in disguise. PCL's uncontradicted assertion that inspectors have visited the site without comment on this work until the Sheet Metal Workers complained about the performance of the work by Labourers suggests that the motives of the union that initiated the complaint were not entirely concerned with the health and safety of workers in Ontario. Certainly there has been a jurisdictional dispute application filed by PCL and the parties have joined issue in that. In other words the same dispute can be characterised as a jurisdictional dispute under the *Labour Relations Act, 1995*.

17. No party impugns the motive of the Inspector, and it is clear that the Inspector was acting entirely in good faith.

18. Again there is no need to determine this issue with any degree of finality. However since the suspension of an order is a discretionary matter, the motivation of the party that raises the issue in the first place is a relevant factor in determining whether the situation is one that requires the continuation of the Order until the matter is finally disposed of by the Board. In *Paul D'Aoust Construction Canada Ltd.* [2001] OOHSAD No. 97 (August 15, 2001), the Board relied heavily on the fact that it concluded the issue was really a jurisdictional dispute in suspending the order (see paragraph 10). It is an appropriate consideration in this decision as well.

Disposition

19. Having regard to the material filed by the parties, the Board is satisfied that it should exercise its discretion under section 61(7) of the Act to suspend the operation of Order No. 1, 2, 3 and 4 in Field Visit No. 6020889 dated April 23, 2009. Accordingly, the application in Board File No. 0276-09-HS and Board File No. 0307-09-HS are hereby granted and Order No. 1, 2, 3 and 4 in Field Visit No. 6020889 are hereby suspended pending the disposition of its appeal.

20. The appeal in Board File No. 0275-09-HS is referred to the Registrar. The parties to this appeal might well wish to consider whether they can agree on some method of co-ordination of the hearing of this appeal with the jurisdictional dispute application, either to hear one or the other first or to hear them both together, at least on this point. If the parties are able to do so, they should advise the Registrar at once.

21. This panel of the Board is not seized.

0483-08-R Teamsters Local Union 938, Applicant v. **Stock Transportation Ltd.**, Responding Party

Bar – Bargaining Unit – Certification – Employee – This application for certification encompassed at least one individual who was an employee in the bargaining unit proposed in a previous application that was dismissed by the Board – The issue before the Board was whether the s. 10(3.1) exemption to the bar imposed by s. 10(3) applied – The Board found that the first condition of s. 10(3.1) was not met since the employee's position at the time of original application (driver for the employer in the City of Toronto) was not different from her position at the time of the new application (driver for the employer in North Scarborough) – Concerning the employer's request to exercise its discretion to impose a further bar pursuant to s. 111(2)(k), the Board found it had none, since by virtue of the second application being barred, the Board was not able to "consider" it – Finally, the Board decided that even if it had the discretion to impose an additional bar, it would not since the original application was filed in January 2006 and an additional bar would subject the employees to a bar until June 2010, a far longer period of repose than contemplated by the Act – Application terminated

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Stephen Krashinsky* and *Ed Arbic* appeared on behalf of the applicant; *Richard J. Nixon, Asiya Hirji, Matt Baynie, Gisele Pengelly* and *Eric Systsma* appeared on behalf of the responding party.

DECISION OF THE BOARD: June 25, 2009

1. This is an application for certification under the *Labour Relations Act, 1995.*

2. This application was filed on May 9, 2008. A previous application for certification (Board File No. 3363-05-R) was dismissed by the Board pursuant to section 10 of the Act on June 4, 2007. The current application encompasses at least one individual who was an employee in the bargaining unit proposed in the previous application. By decisions dated July 11 and September 17, 2008, the Board found that the previous application for certification ("the original application") was an application for certification which engages the "bar" under section 10(3) for the purposes of this application ("the new application"), unless the exemption in section 10(3.1) applied. This decision is addressed to that issue.

3. Sections 10(3) and (3.1) of the Act provide:

> **10.** (3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed.
>
> (3.1) Despite subsection (3), the Board may consider an application for certification by a trade union as the bargaining agent for employees in a bargaining unit that includes an employee who was in the bargaining unit proposed in the original application if,
>
> (a) the position of the employee at the time the original application was made was different from his or her position at the time the new application was made; and
>
> (b) the employee would not have been in the bargaining unit proposed in the new application had he or she still been occupying the original position when the new application was made.

4. The scope of the original application and the new application, as well as the history of other applications between the parties, is fully reviewed in the Board's decision dated July 11, 2008. The bargaining unit in the original application ("the original unit") was for "all employees of Stock Transportation in the City of Toronto", with certain exceptions described in greater detail below. The description of the bargaining unit in the new application ("the new unit") was the subject of a lengthy discussion in the July 11, 2008 decision. That decision concluded, at paragraph 18, "that the union is applying for a bargaining unit of employees [more accurately, drivers and driver trainers] based at the employer's North Scarborough location, currently at 1365 Kennedy Road", again with certain exceptions described in greater detail below.

5. It is common ground between the parties that there was one individual, Joyce Goodman, who was an employee in the bargaining unit proposed in the original application as of the date of that application who was also an employee in the bargaining unit applied for by the union in the new application as of the date of that application. Thus, Goodman engages the bar under section 10(3) unless the discretionary exemption under section 10(3.1) applies to her. There are 54 other individuals who were employees in the new unit who the employer asserts were also employees in the original unit. The union resists this assertion. On the agreement of the parties, the hearing proceeded to determine whether the exemption under section 10(3.1) applied to Goodman. The employer reserved its right to argue that the exemption under section 10(3.1) did not apply to each of the remaining 54 individuals should the Board determine that this application was not barred by virtue of Goodman's employment.

6. Goodman was at all material times employed as a part-time school bus driver by the employer. At the time of the original application she was dispatched from the Toronto West Customer Service Centre (CSC) of the employer. At the time of the new application she was dispatched from the Toronto North CSC which is located in North Scarborough. The Toronto North CSC did not exist at the time of the original application.

7. The employer argues that Goodman's position at the time of the new application was the same as it was at the time of the original application with the result that the exemptions under section 10(3.1) do not apply. It notes that in *Greenvilla Homes*, [2005] OLRB Rep. Mar./Apr. 299 (March 21, 2005), the Board stated "that various changes in one's employment circumstances could result in a change of one's position: a change in job duties, in responsibilities, in status, in craft, in working conditions, or locations (being not merely a different worksite)". Based on a careful review of the evidence, the employer argues that none of these have changed for Goodman, and therefore it argues that there has been no change in her position.

8. The union notes that Goodman's dispatch base changed from the time of the original application to the time of the new application. It argues that change in base represents a change in position for two reasons. First, referencing the manner in which the union's various applications for certification have been responded to by the employer and handled by the Board (and more fully described in the Board's decision dated July 11, 2008), it argues that the parties have *de facto* recognized that there are three "bargaining units" each identified in terms of a base, one at Upton Road, one at Toronto West and one at Toronto North. Second, it argues that the Board's jurisprudence recognizes the significance of the dispatch base to drivers in the transportation sector, citing paragraph 18 of the July 11, 2008 decision as well as *Rainbow Concrete Industries*, [2006] OLRB Rep. May/June 409 (June 29, 2006), *Western Inventory Services*, October 6, 1989, [1989] O.L.R.D. No. 1852, *Capital City Transport Limited*, [1969] OLRB Rep. February 1170 and *Brantox Holdings Limited*, [1969] OLRB Rep. August 609. The union notes that in the case at hand each base constitutes a separate "Division" for the employer and focuses on the evidence which shows changes in the terms and conditions of drivers based on the Division to which they are assigned.

9. The opposing conclusions reached by the employer and the union as to whether or not Goodman's position has changed are the product not so much of disagreements with respect to the evidence, but rather a disagreement as to what is meant by "position" for the purposes of the section 10(3.1) exemption from section 10(3). It is to this question that I now turn.

10. I begin by noting that the Board has stated that the focus of section 10(3) is upon employees, not on the bargaining unit *per se*. In *Smid Construction Ltd.*, [2002] OLRB Rep. Nov./Dec. 1169 (December 11, 2002), the Board stated:

> 6. [In *Bayview-Wellington Homes Inc.*, [2001] O.L.R.B. Rep. Nov./Dec. 1346, the] employer argued that the section ought to be read as barring an applicant for certification for the same bargaining unit in a subsequent application. The Board rejected that argument and concluded at paragraph 33:
>
> > The legislature's intention must be derived from the words of the statute. As stated in *Windsor Racetrack Slots #2* [[2001] OLRB Rep. Mar./Apr. 532], the intention of the legislative change in section 10(3) was to broaden the bar. The bar is broader than it was. It now applies to all unions. The device used in the words of the existing statute is to identify individuals rather than bargaining units or the position of the individual. The legislature did that by using the word "any employee" in the statute. As stated, the result of that is where there is an entirely new group of employees in the new application from those who were the subject of the original application the statute does not impose a bar.
>
> 7. With respect I agree with that analysis. Section 10(3) focuses on employees, not on bargaining unit *per se*. All trade unions are barred from making an application "as the bargaining agent of any *employee* that was in the bargaining unit proposed in the original application". It is necessary to situate the employee in the previous bargaining unit to identify which employees may not be the subject of a certification application. This is consistent with the basic structure of the statute: a trade union represents employees. The bargaining unit serves to define the boundaries separating the employees the union does represent from those it does not.

11. The focus of section 10(3.1), however, is on the positions held by those employees in bargaining units proposed in an original application for certification and a new application for certification at the time of those applications. Section 10(3.1)(a) and (b) both refer to the "position" of the employee and "the position of the employee at the time the original application was made" referred to in section 10(3.1)(a) is the same as the "original position" referred to in section 10(3.1)(b). The word "position" must, therefore, be interpreted in a consistent manner that makes sense of both parts of the section. The "difference" in position held by the employee at the time of the original application compared to the time of the new application described in 10(3.1)(a) is, therefore, one which could result in the employee not being in the new bargaining unit as described in section 10(3.1)(b). Thus, what is relevant to describing the position of an employee for the purposes of the application of section 10(3.1) is determined not in the abstract, but by reference to the two bargaining unit descriptions at issue.

12. The identification of position for the purposes of section 10(3.1) by reference to bargaining unit descriptions is reflected in the Board's jurisprudence cited by the parties in this case.

13. In *Smid Construction Ltd.*, the original application was, in pertinent part, for "all carpenters and carpenters' apprentices" of an employer. The new application was for "all construction labourers" of the same employer. The Board noted that the construction industry is organized primarily along craft lines and that construction bargaining units are granted on the basis of

crafts at work on the date of application. While the craft performed by a given employee could change, on any given day the employee could perform only one craft. In order for an individual to have been an employee in the original bargaining unit, he or she would have had to have been working as a carpenter or carpenter's apprentice on the date of that application. On the other hand, in order for the same individual to also have been an employee in the new bargaining unit, he or she would have had to have been working as a labourer on the date of that application. The Board commented (at paragraph 19) that "it follows inevitably that the employee's "position" at the time of the Carpenters' Application was different from his or her position at the time of the Labourers' Application". In other words, the determining factor with respect to an employee's "position" for the purposes of section 10(3.1), was the craft used to describe and distinguish the bargaining units in question.

14. In *Greenvilla Homes*, the original application was, in pertinent part, for a bargaining unit of construction labourers and journeymen and apprentice carpenters employed by the employer in Board Area 8. The new application was for a bargaining unit of construction labourers and journeymen and apprentice carpenters employed by the employer in Board Area 9. An individual had been employed as a construction labourer by the employer on the date of both applications. The employer argued that as the individual had been employed as a construction labourer on both dates, there was no change in the individual's "position" for the purposes of section 10(3.1); the union argued that being employed in Board Area 8 on the date of the original application and Board Area 9 on the date of the new application constituted a change in position.

15. The Board stated:

> 33. The Union suggests, in my view correctly, that various changes in one's employment circumstances could result in a change of one's position: a change in job duties, in responsibilities, in status, in craft, in working conditions, or location (being not merely a different worksite) – in each of these the change could be such as to alter one's position.

This is the comment relied upon by the employer in this case as the basis for its careful review of whether or not there has been a change in job duties, responsibilities, status, craft working conditions or location for Goodman. I would note, however, that in *Greenvilla Homes* the Board suggested only that various changes in one's employment circumstances could result in a change in one's position, not that they would in any given case. The Board continued:

> 34. Clearly, as was explained in *Smid*, above, the craft being performed by a worker affects their position. Carpenters are not in the same position as labourers. But, as the Union argues, that does not describe all of what constitutes a position. A position is also affected, and may be changed, by where the work is performed. Not every change in worksite will result in a change of position, but, in the construction industry, a change in location from one Board Area to another will result in a change of position. In the construction industry a change in Board Area is like a change in workplace in other industries. This is because the two fundamental determinants of an employee's position in the construction industry, outside of the ICI, is their craft and the Board Area in which they are working. These two considerations inform the bargaining rights which a union may obtain.
>
> ...

> 36. ... What is relevant is the relative scope of the two bargaining units in the first and second certification applications. If there is overlap between the two bargaining units (e.g. if a Board Area is common to the bargaining unit proposed in the original application and in the subsequent application), then the employee will not be in a different position. This determination can be made without determining the actual location where the employee worked previously. It will be sufficient to know that the worker fell within a bargaining unit which encompasses (or is encompassed by) the bargaining unit in the subsequent application. If there is no overlap, as in this case, then the position will be different.

Once again, what was relevant for the purposes of determining whether there had been a change in an employee's "position" within the meaning of section 10(3.1), was determined by reference to the bargaining unit descriptions used, and in particular the craft description (which had not changed) and the Board Area, or location, in which the work was performed. No consideration was given to whether there had been a change in job duties, responsibilities, status or working conditions because they were simply not relevant to the determination in the case at hand.

16. In *Excel Technologies Limited*, [2007] OLRB Rep. Mar./Apr. 353 (April 30, 2007), the original application was, in pertinent part, for all employees of the employer in the City of Brampton, Ontario. The employer moved its operations to Milton. A new application was filed for all employees of the employer in the Town of Milton, Ontario. Ten individuals who had been employed by the employer in its operations in Brampton were employed by the employer to do precisely the same jobs in Milton. The employer argued that they were in the same position for the purposes of section 10(3.1). The Board rejected this argument, saying:

> 14. In our view, the word "position" in s. 10(3.1) must be given context to avoid a result that is inconsistent with sound labour relations and the purposes of the Act. The position of the employee is not the same unless it is with the same employer and in a geographic location which is covered by the scope clause of the bargaining unit proposed by the union in the original application....
>
> 15. This conclusion is reached through an analysis of the statute and is dictated so as to avoid an interpretation which in some circumstances makes no labour relations sense. In considering s. 10(3.1) it is important to recognize that all bargaining units have a geographic scope which may range from a workplace to the province. Therefore, one of the ways that an employee "would not have been in the bargaining unit proposed in the original application" is if the employee is no longer in the geographic area covered by the scope clause of the collective agreement.

In other words, the geographic area in which the work was performed was relevant for the purposes of determining an employee's "position" within the meaning of section 10(3.1) because it formed part of the bargaining unit descriptions in the original and new application.

17. Thus, I conclude that the identification of "position" for the purposes of section 10(3.1) is determined by reference to the characteristics used in the bargaining unit descriptions proposed in the original and new applications to determine whether an employee falls within those bargaining units.

18. As noted, the employer's argument focused upon the job duties, responsibilities, status, craft, working conditions or locations (being not merely a different worksite) of Goodman's employment at the time of the original application compared to the time of the new application.

19. Under the rubric of "job duties", the employer referred not simply to the job position held by Goodman at both times (i.e. she was a school bus driver), but to the specific duties she performed: the size of the bus she drove; the fact that the passengers on the bus were children being driven to and from school; the location of the routes driven in the City of Toronto; the fact that she drove both a morning and an afternoon route; the fact that she was provided with route copies; the fact that she communicated with her dispatch using a two way radio located in her bus and using the same radio codes; her responsibilities for washing and gassing-up her bus etc. With respect, none of these specific duties are relevant to defining Goodman's "position" for the purposes of either the original or the new bargaining unit. Whether or not Goodman was, for example, provided with route copies or used a two way radio would not affect her inclusion or exclusion in either bargaining unit.

20. Under the rubric of "status", the employer referred to Goodman's seniority, her bus driver number and contents of her personnel file, none of which it says have changed. Once again, none of these are relevant to defining Goodman's "position" for the purposes of either the original or new bargaining unit. The employer also refers to Goodman's "classification as a driver part time" under the rubric of status. Part-time or full-time status is relevant to the manner in which some positions in the original and new bargaining units were described: both exclude full-time dispatchers and full-time office and clerical staff. However, it is not relevant to the manner in which the positions of bus drivers are described: both units include all bus drivers, whether or not they are full-time or part-time.

21. Under the rubric of "craft", the employer notes that Goodman was a bus driver at the time of the original and new applications: she did not become a mechanic, an office employee or a dispatcher. "Craft" has a specific meaning in labour relations. It is referred to in section 9(3) of the Act which provides:

> **9.** (3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to the skills or craft, and the Board may include in the unit persons who according to established trade union practice are commonly associated in their work and bargaining with the group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

Neither the original or new bargaining unit relate to a "craft" in this sense. The fact that Goodman remained a bus driver and did not become a mechanic, an office employee or dispatcher relates not to her craft but to her job position.

22. Under the rubric of "working conditions", the employer asserts that at the time of both the original application and the new application: Goodman worked in and out of a bus; her compensation was determined by the Stock's Driver's Wage and Benefits Package; her hours of work were determined by the length of her route; she was paid for a daily minimum of hours; she was paid by

direct deposit; she seldom drove her bus to one of Stock's CSC's offices; during the summer months she was laid off; her bus route copies were provided by a school board; numerous additions and deletions were made to her routes; changes in her routes were made by the school board; she received "pay memos" (an employer newsletter); she had the benefit of the same Stock committees; was subject to the same disciplinary process; was subject to the same Divisional Leadership Team structure; was paid to perform "extras"; and was eligible for "Driver Relations recognition". The union challenges a number of these specific assertions, and generally asserts that working conditions were significantly impacted by the "base", or CSC, to which a driver was assigned. None of these working conditions, *per se*, are relevant to the definition of position in either the original or new bargaining unit. All of them could have changed without affecting the position held by Goodman given the bargaining descriptions at issue.

23. Under the rubric of "location (being not merely a different worksite)", the employer focuses on the level of cohesiveness and interaction between the three Toronto CSCs. The employer argues that; the three Toronto CSCs operate under a single umbrella management structure; at the level of the three CSCs themselves, there was shared management; recruitment for the three CSCs was done centrally; training and testing was shared by the three CSCs; school bus routes and buses were regularly moved from one of the three CSCs to another; maintenance and repair functions were shared; drivers were shared; mechanics were shared; school bus parking was shared; time recording and payroll functions were shared; drivers at each of the three CSCs attended the same types of meetings; "Booster Buddies" were assigned on the basis of zones rather than CSCs; some social events were shared; and that seniority was maintained when a driver transferred from one CSC to another. The employer also argues that:

> Joyce Goodman was never based at one of Stock's Toronto CSCs. She was not a factory worker who reported to work at a factory every day and punched in and out at the end of her shift, had a locker or worked at a work station. She seldom attended at any of Stock's CSCs. Instead, Joyce Goodman's connection to the Stock's Toronto CSCs was via the two-way radio in her school bus. Even that connection to a CSC was tenuous, as the dispatchers changed and could have been located anywhere in the City of Toronto.

24. It is convenient to address the last argument first. Goodman's "position" for the purposes of section 10(3.1) need only be considered if section 10(3) is engaged. Section 10(3) is engaged if an individual was an employee in both the original and the new bargaining unit. It is an agreed fact that Goodman meets this criterion. This means that at the time of the new application Goodman was "based in" the employer's North Scarborough location, i.e. the Toronto North CSC. That is, whether or not Goodman was ever "based at" any of the Toronto CSCs, it is an agreed fact that she was "based in" the Toronto North CSC at the time of the new application.

25. Whether or not the connection of Goodman, or the other drivers, to the Toronto North CSC was "tenuous", and whether or not the three Toronto CSCs demonstrated a high level of cohesion and interaction (an argument which is rejected by the union based on its own review of the evidence) might be relevant to the question of whether or not a bargaining unit described in terms of one of the Toronto CSCs or "bases" is appropriate, but it is not relevant to the determination to be made under section 10(3.1) in this case. That determination is to be made by reference to the bargaining units set out in the original and new applications for certification. In any event, in this case the employer agreed that the bargaining unit description in the new application was appropriate.

26. I pause here to note that I also reject the arguments of the union as to the significance of "base" to the determination of Goodman's position. As noted by the union, one way in which bargaining units involving drivers are described is by reference to a location at which the drivers are based. The significance of this to the case at hand, however, is not, as argued by the union, that this is a common way of describing such bargaining units in general. Rather it is that it is one way in which the bargaining units in the original and new applications in particular were described.

27. I note, in this respect, that I place no weight whatsoever on the assertion by the union that the parties have "*de facto*" recognized that there are three bargaining units, one at Upton Road, one at Toronto West and one at Toronto North. Leaving aside the fact that the factual underpinnings of this assertion are strongly contested by the employer, and the fact that, as the employer quite properly points out, only the bargaining unit at Upton Road has been certified by the Board and the employer has not agreed to recognize any other bargaining unit, the claim is simply irrelevant to the question posed by section 10(3.1). Section 10(3.1) directs consideration of the bargaining units proposed in the original and new applications. As stated in the decision in this matter dated September 17, 2008 with respect to a similar argument made by the union in relation to section 10(3):

> The use of the word "proposed" in subsection 10(3) is of significance because it is the same word that is used in subsection 7(12). Subsection 7(12) provides in part that "the application shall include a written description of the proposed bargaining unit".

The same reasoning applies to section 10(3.1). What matters are the written descriptions of the bargaining units included in the original and new applications for certification at issue.

28. I note parenthetically that for essentially the same reasons during the hearing I rejected the union's argument that 53 of the 54 other individuals claimed by the employer to be employees in both the original and the new bargaining unit were agreed by the parties not to be employees within the original bargaining unit. As stated during the hearing, the parties did not agree that the 53 individuals were not employees in the bargaining unit proposed in the original application. Indeed, in its response to that application the employer took the position that they were employees within that bargaining unit. The fact that the parties subsequently agreed to a different bargaining unit in that application and agreed that the 53 individuals were not employees within that bargaining unit is not determinative of the question posed by section 10(3): whether they were employees in the bargaining unit proposed in the original application.

29. In fairness to the parties, I observe that in earlier decisions in this matter I had suggested that the determination of what constituted the employee's position, and in particular the relevance of the base from which an employee was dispatched, was essentially a factual dispute which might require days of evidence. In retrospect, that suggestion was incorrect. The analytical approach suggested by this decision narrows the areas of relevant factual inquiry (and hence potential dispute) to the characteristics used in the bargaining unit descriptions proposed in the original and new applications to determine whether an employee falls within those bargaining units. Accordingly, much of the evidence introduced by the parties during the hearing was simply irrelevant, as stated above.

30. In this case, the bargaining unit description in the original application was as follows:

> all employees of Stock Transportation Ltd. in the City of Toronto, save and except supervisors, persons above the rank of supervisor, full-time dispatchers, mechanics, sales, full-time office and clerical staff and persons covered by the certificate issued by the Board on September 20, 2005 in board File No. 1784-05-R, then by any collective agreement negotiated between the union and the employer pursuant to that certificate.

The certificate issued in Board File No. 1784-05-R was with respect to "all employees of Stock Transportation Ltd. working in and out of 17 Upton Road, Scarborough, Ontario", with the same exclusions as in the original application under consideration here. In the result, the bargaining unit description in the original application was effectively as follows:

> all employees of Stock Transportation Ltd. in the City of Toronto, save and except supervisors, persons above the rank of supervisor, full-time dispatchers, mechanics, sales, full-time office and clerical staff and all employees of Stock Transportation Ltd. working in and out of 17 Upton Road, Scarborough, Ontario.

31. The bargaining unit description in the new application was as follows:

> all drivers and driver trainers of Stock Transportation Ltd. based in the City of Toronto, save and except supervisors and persons above the rank of supervisor, office and clerical staff, summer students, employees covered by the subsisting collective agreement between the parties negotiated pursuant to the certificate issued by the Board on September 20, 2005 in Board File No. 1784-05-R and employees in the bargaining unit subject to the statutory bar pursuant to the Board's decision in Board File No. 3363-05-R.
>
> **NOTE:** The employees affected by this application for certification are currently based at the employer's "Scarborough North" location. The collective agreement referred to in the bargaining unit description proposed above covers employees based at the employer's Scarborough location on Upton Road. The statutory bar referred to in the bargaining unit description proposed above applies to a bargaining unit of employees based in Etobicoke. The union intends to apply for the Etobicoke group separately, after the statutory bar is lifted.
>
> The reason that the union applies herein for a unit of drivers, etc. based in the "City of Toronto", rather than for a unit of drivers, etc. based at the Scarborough North location, is that the union understands that the employer is moving employees out of this Scarborough North location. The move has already been announced for the mechanics at the Scarborough North location and it is anticipated that the drivers will similarly be moved. The union does not know where the employer will be moving the drivers.

For reasons stated in the Board's decision dated July 11, 2008, the bargaining unit in the new application was effectively as follows:

> All drivers and driver trainers of Stock Transportation Ltd. based in the employer's North Scarborough location, currently at 1365 Kennedy Road, save and except supervisors and persons above the rank of supervisor, office and clerical staff, summer students.

32. The original bargaining unit was defined in terms of job position (i.e. all employees other than those in the positions of supervisors, persons above the rank of supervisor, full-time dispatchers, mechanics, sales, full-time office and clerical staff), the employer (of Stock Transportation Ltd.) geography and base (in the City of Toronto, except those working in and out of 17 Upton Road). The new bargaining unit was defined in terms of job position (i.e. all drivers and driver trainers other than those in the positions of supervisors, persons above the rank of supervisor, full-time dispatchers, mechanics, sales, full-time office and clerical staff), the employer (Stock Transportation Ltd.) geography and base (based in the North Scarborough Location).

33. Having regard, then, to the bargaining units proposed in the original and new applications, has Goodman's position changed for the purposes of section 10(3.1)(a)? At the time of the original application, in terms of the original bargaining unit description, her job position was that of a driver employed by Stock Transportation Ltd. in the City of Toronto. At the time of the new application, in terms of the new bargaining unit description, her position was that of driver employed by Stock Transportation Ltd. based in the employer's North Scarborough location. In addition, there is no dispute that she continued to be employed in the City of Toronto at the time of the new application. Therefore, at the time of the new application Goodman continued to be a driver employed by Stock Transportation Ltd. in the City of Toronto. Accordingly, her position had not changed from the one that she held at the time of the original application.

34. In order for the exemption under section 10(3.1) to apply both the condition in 10(3.1)(a) and (b) must be satisfied. Given my conclusion with respect to the fact that Goodman does not satisfy the condition in 10(3.1)(a), it is not necessary for me to consider whether the condition in section 10(3.1)(b) is satisfied.

35. The union argues that if the bar under section 10(3) applies to this application, then on the plain language of section 10(3) the result is that the Board "shall not consider" the new application, and the application must be terminated on that basis. That is, the union argues, the present application would not itself give rise to a bar to a further application.

36. The employer argues that if the present application is barred pursuant to section 10(3) the Board should exercise its discretion pursuant to section 111(2)(k) of the Act to bar the union from making a new application for a period of a year.

37. Section 111(2)(k) provides:

> **111.** (2) Without limiting the generality of subsection (1), the Board has power,
>
> ...
>
> (k) to bar an unsuccessful applicant for any period not exceeding one year from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding one year from the date of the dismissal of the unsuccessful application;

The employer relies upon the phrase "or to refuse to entertain a new application by an unsuccessful applicant", however, the portion of clause (k) within which that phrase appears concludes "within any period not exceeding one year from the date of the dismissal of the unsuccessful application". As the union argues, the effect of the application of section 10(3) to this application is that it is not "dismissed" rather it is that the Board is directed not to "consider" it. I conclude that the discretion given to the Board under section 111(2)(k) does not arise in the circumstances of this case.

38. Even if I had discretion to bar a new application by union, I would not choose to do so. The original application which gave rise to the bar of the present application was filed on January 9, 2006, but not dismissed until June 4, 2007, with the effect that the bar arising from that application ran until June 2008. As I have found, the dismissal of that original application has had the effect of barring the present application. Imposition of a further one year bar at this time would mean that employees subject to the original application would be subject to a bar until June 2010. This is a far longer period of repose than contemplated by the Act.

39. At the hearing, the employer requested the opportunity to make further submissions with respect to whether a further bar should be imposed if the present application was found to be barred by section 10(3) of the Act. The union resisted this request. I decline to agree to the employer's request. The employer cannot be said to have been taken by surprise by the union's argument that if the present application was barred pursuant to section 10(3) as untimely, then there is no bar to a subsequent, timely, application. The union raised this argument on the very first day of the hearing, at which time the employer responded, as it did on the last day of hearing, by referring to section 111(2)(k).

40. Given my findings, section 10(3) applies and the discretionary exemption in section 10(3.1) does not apply. Since section 10(3) directs the Board not to consider the application, this matter is terminated.

3041-08-OH Susan Vogan, Applicant v. **Ten Star Financial Services**, Responding Party

Health and Safety – *Prima Facie* – The applicant alleged she was terminated by the company's President as a reprisal for raising health and safety concerns – On review of the Board's case law and the pleadings, the Board concluded that the pith and substance of the complaint was that she was unjustly terminated from employment for complaining about the President's verbal abuse (that is, alleged bullying, personal harassment and emotional and psychological abuse), which she found deeply insulting, demeaning and humiliating – Given, however, that there was no indication of the existence of a health and safety nexus the Board exercised its discretion not to inquire into the matter – Application dismissed

BEFORE: *Patrick Kelly*, Vice-Chair.

DECISION OF THE BOARD: June 3, 2009

1. This is an application alleging an unlawful reprisal contrary to section 50 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, as amended (or "the Act").

2. By decision dated February 25, 2009, I directed the parties' written submissions concerning the preliminary motion of the responding party employer ("the employer") requesting the dismissal of the application on the basis that the applicant's allegations, even if accepted as true, do not constitute a violation of section 50 of the Act. This decision deals with those submissions.

3. The applicant (or "Ms. Vogan") was terminated from her employment within approximately two weeks of sending to the employer's representatives a letter complaining of her treatment at the hands of the employer's President. She contends that the behaviour complained of at paragraphs 17 through 19 of the application and alluded to in a letter dated November 14, 2008 authored by the applicant, constitutes bullying and/or personal harassment and/or emotional and psychological abuse, and is a health and safety concern or a workplace hazard within the meaning of the Act. She further maintains that her termination constituted a reprisal for having raised her health and safety concerns.

4. For convenience, set out below are the referred to paragraphs of the application:

> 17. Within weeks of commencing her new position, Baird (the employer's President) began subjecting the Applicant to verbal abuse and to unfounded and unprofessional criticism. For example, Baird:
>
> - Often sighed loudly and yelled at the Applicant "wrong!" in response to the Applicant's opinions and/or actions;
>
> - Repeatedly stated "I can't get it through your head"; "you can't keep making mistakes like this, this is stupid"; "it's not rocket science"; "it's simple"; and/or "why do you make such stupid mistakes"; and
>
> - Often exhibited aggressive demeanor. For example, Baird would often have temper tantrums where he would clench his fists, clench his teeth and growl, and/or grab at his hair and yell at the Applicant, telling her how stupid and incompetent she was.
>
> 18. The Applicant was obviously shaken and humiliated by the verbal assaults inflicted upon her by Baird. The abuse was so unbearable at times that she broke into tears in the workplace in front of her colleagues and superiors on a number of occasions.
>
> 19. The Applicant felt unsafe, embarrassed and mortified as a result of Baird's conduct.

In her letter addressed to "Group Department", which the applicant contends comprised the employer's Controller and Human Resources Ombudsperson, Ms. Vogan wrote:

> "I am writing this so that we are all aware of my current situation in the Group Department at Ten Star.
> First of all I would like to say that I am grateful to have had the opportunity to work in the department. I have learned an enormous amount in the last 6 months both about Group Insurance and about myself.
>
> I would like you both to be aware that I have done nothing but my very best everyday since I was moved to this department.

> I have worked many overtime hours and often have worked through my lunch to get the work load to a manageable level. Although it has been very stressful at times I have, for the most part, enjoyed the challenge. I think I have shown initiative and have been very committed to doing the very best I can.
>
> As you all know, I had no experience in Group Insurance when I started in May. With the exception of the few hours of training that David [Baird] provided to Loretta and myself, several days after taking on this position, I have had very little support. Most of the knowledge I have acquired has been self taught. I have much more to learn and I am sure that with proper training I will be successful in doing so.
>
> The situation that I have come to find intolerable is the verbal abuse I am being made to endure by David.
> It is unacceptable and it simply has to stop. I cannot continue to be called stupid. Never in my life has anyone ever spoken to me in this manner. Adults don't speak to other adults in such a demeaning way, regardless of who they are. Evidently there has been some miscommunication between David and myself. If there is anything I can do to clear this up, please let me know.
> Frankly, at this point I feel like I am being attacked. I have been verbally abused in front of my coworkers many times and it is humiliating.
> As you both know, I brought the situation to your attention several months ago. I did inquire at that time if there is a policy in place at Ten Star to promote a positive work place. The situation did improve briefly, and I was grateful for your support but recently the verbal abuse has escalated to a point that I find intolerable. If I am not being called "Stupid" I am being told "It's not rocket science" or some other way of alluding to my apparent incompetence. I find it to be a hostile work environment.
>
> In March I will have been employed at Ten Star for 3 years. I have very much enjoyed my time here. It has always been a great place to work and I have made some very good friends. I hope very much that we can come to some resolution with this matter. If there is anything I can do that would be helpful please let me know.
> I would appreciate your feedback."

5. The applicant contends that bullying and/or abusive conduct are behaviors recognized by the Canadian Centre for Occupational health and Safety and by labour relations arbitrators that are intended to intimidate, offend, degrade or humiliate another individual. In other words, it is intended to, and does cause, harm to the psychological, mental, and sometimes physical well-being of the person to whom it is directed. It matters not, for the purposes of the Act, and in particular subsection 25(2)(h)'s employer-imposed obligation to take every reasonable precaution for the protection of a worker, whether a workplace hazard arises out of the worker's inter-personal dealings in the workplace, as opposed to merely the workplace's physical surrounding. The Act is remedial legislation, and as such, must be given a broad and liberal interpretation in keeping with the purposes and objectives of the legislative scheme: see *Ontario (Ministry of Labour) v. Hamilton (City)*, [2002] O.J. No 283 (QL) (January 29, 2002) and *Placer Dome Canada*, [2005] OLRB Rep. May/June 481 (May 13, 2005).

6. The applicant points out that tribunals dealing with the Act have in the past recognized as hazardous conditions which can give rise to employee health and safety concerns: sexual harassment (*Lyndhurst Hospital*, [1996] OLRB Rep. May/June 456 and *Meridian Magnesium Products Limited*, [1996] OLRB Rep. Nov./Dec. 964); abusive behavior of a co-worker (*Ontario Public Service*

Employees' Union (Re), [1996] O.O.H.S.A.D. No. 53); and the presence of a hostile customer (*Barmaid's Arms*, [1995] OLRB Rep. Mar. 229).

7. In any event, the applicant submits, the focus of a section 50 reprisal complaint is not whether in fact there was a hazardous or unsafe condition. A worker is not required by section 50 to adopt "a conscious reliance on the statute as the framework within an action [by the worker] is taken..." (*Lyndhurst Hospital, supra*, paragraph 27). There is no requirement by the worker to refer to the Act in order to be seeking its enforcement: see paragraph 9, *Barmaid's Arms, supra*. The focus of a reprisal complaint is the alleged reprisal itself (in this case, termination) and the employer's motivation. It suffices that the worker merely raise an issue that may reasonably be interpreted as a concern for his or her safety. This, the applicant submits, she did orally and in writing. Her contention is that she was terminated as a result, thus bringing her squarely within section 50. Whether or not, objectively speaking, there was an actual hazardous condition prompting her concern is irrelevant, so long as the concern itself was genuine.

8. The employer does not dispute that the applicant was terminated from employment. However, the employer says the applicant's complaint is really grounded in wrongful dismissal. The dispute, as the employer sees it, is about the appropriate period of notice of dismissal. There is nothing in the applicant's allegations to suggest she sought the enforcement or the protection of, or to work in compliance with, the Act or any Regulation made under the Act. She made no attempt to refuse work on the basis that it was unsafe, nor did she have any reasonable grounds to believe the work was unsafe. Moreover, relying upon the Board's decision in *Centro Donne Inc.*, [1997] OLRB Rep. Jan./Feb. 9, the employer contends that mere stress suffered by the applicant is not actionable pursuant to the Act, where the stress is the by-product of a non-hazardous condition or event. In these circumstances, the Board ought to be cognizant of the strategic advantages that a reprisal action under the Act offers over the filing of an action in wrongful dismissal, and, as noted in *Tri-Green Construction Inc.*, [2008] OLRB Rep. Jan./Feb. 111, "discourage clearly improper recourse to its procedures."

***

9. Section 50 of the Act reads:

> **50.**(1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
>
> (b) discipline or suspend or threaten to discipline or suspend a worker;
>
> (c) impose any penalty upon a worker; or
>
> (d) intimidate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Board in which case any rules governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Board may inquire into any complaint filed under subsection (2) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

(4) On an inquiry by the Board into a complaint filed under subsection (2), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995*, apply with all necessary modifications.

(5) On an inquiry by the Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

(6) The Board shall exercise jurisdiction under this section on a complaint by a Crown employee that the Crown has contravened subsection (1).

(7) Where on an inquiry by the Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

(8) Despite subsection (2), a person who is subject to a rule or code of discipline under the *Police Services Act* shall have his or her complaint in relation to an alleged contravention of subsection (1) dealt with under that Act.

10. In *Meridian Magnesium*, the complainant, Patricia Mustey, brought a section 50 reprisal application on the basis of sexual harassment in the workplace. Ms. Musty contended that sexual harassment and gender discrimination were "hazards" within the meaning of the Act, that the company's supervisors were the source of the gender discrimination to which she was subjected, and that more senior members of management failed to deal with the situation when she brought it to their attention. Ms. Mustey said that the circumstances worsened over time, that she was penalized for raising her concerns, and she ultimately was forced to leave the workplace. Not only did she launch the section 50 reprisal application, she also attempted unsuccessfully to claim workers' compensation benefits, filed a complaint with the Ontario Human Rights Commission, and initiated a wrongful dismissal action in the courts.

11. The Board engaged in a thorough examination of the enforcement mechanisms in the Act as compared to the *Ontario Human Rights Code* (or "the Code"). The Board then concluded that there was an arguable case that sexual harassment could be covered by the Act. However, the Board also expressed considerable doubt about coming to such a conclusion, and wrote commencing at paragraph 128:

128. The provisions of the OHSA [Occupational Health and Safety Act] focus primarily – if not exclusively – on *physical* hazards in the workplace: on machines, devices, things, equipment, protective devices, building structures, dangerous biological or physical agents, and so on. (See, for example, sections 8, 9, and 25, and the powers of an inspector under section 54-60). Even the right to refuse unsafe work under section 43 focuses on the "equipment, machine, device or thing the worker is to use" or the "*physical* condition of the workplace". The physical element is either implicit in the hazard specifically identified, or has been added by the Legislature, as in section 43 which gives an employee the right to refuse to work when the situation is unsafe. If section 43 had been intended to cover *any condition* in the workplace, the word "physical" would not have been necessary.

129. Not only does the OHSA appear to be concerned with physical threats of one kind or another, but the provisions of the OHSA do not seem to focus at all on "dangerous people", except in relation to physical activities or the dangerous operation of equipment. Thus, section 28(2) of the OHSA provides:

> 28.(2) No worker shall,
>
> ...
>
> (b) use or operate any equipment, machine, device or thing or *work in a manner that may endanger himself, herself or any other worker*, or
>
> (c) engage in any *prank*, contest, feat of strength, unnecessary running or *rough* and boisterous *conduct*.

Even *Barmaid's Arms*, [1995] OLRB Rep. March 229, a case upon which the complainant relies, involved a *physical* threat to the employee in question.

130. This is not to say that the OHSA ignores employee behaviour that could pose a danger to other workers. If an employee engages in violent behaviour at work, "rough conduct" or some ill-intentioned "prank", such behaviour may be caught by OHSA section 28(2), even though it may be a manifestation of misogyny, racism, or other problems addressed in the Code. One must be careful not to unduly limit the scope of OHSA protections, or assume too readily that behaviour can be precisely characterized or confined to precise legal compartments. It is simply that "hazardous words", "dangerous pictures" and "injurious attitudes" – the allegations in this case – do not fit very well into the range of risks to which the OHSA is specifically addressed. Nor are these the sorts of things that appear to be contemplated by the kinds of remedial orders that an inspector may make under section 57. The provisions of the OHSA do not clearly speak to or easily encompass "dangers" to an employee's *mental* health – be they overt and unlawful harassment (sexual, racial or otherwise) as alleged in this case, or simply conditions in the workplace which generate stress (technological change, impending layoffs, a new boss, friction with other employees, workload, etc.). Nor is it easy to accept that anything that causes "stress" is necessarily a "hazard" regulated by the OHSA.

12. In the end, the Board exercised its discretion not to inquire into the section 50 complaint, but rather to defer to the procedures of the Code and the Human Rights Commission because "remedying gender discrimination and harassment (including reprisals) is the work of the Human Rights Commission and boards of inquiry under the Code – not the Ontario Labour Relations Board under the OHSA." (paragraph 166)

13. In *Scarborough (City)*, [1997] O.L.R.D. No 4247, the Board considered a similar section 50 reprisal complaint. The complainant had worked for a municipality ("the City") for a number of years prior to her promotion in 1994. She contended that in her new position she was subjected to a course of conduct by her superiors that posed a danger to her health and safety and caused her depression, anxiety and other psychological difficulties. The course of conduct complained of was summarized by the Board at paragraph 46 as follows:

> (a) about the amount of work she had to do and the time within which she had to do it;
>
> (b) that she was given inadequate training and resources, and was forced to work unpaid overtime hours;
>
> (c) that her conditions of employment constituted differential treatment and that she was harassed and discriminated against by the responding party;
>
> (d) that she has suffered stress and physical illness, and emotional distress as a result of working conditions which she alleges constituted a serious workplace hazard, and that as a result of this and rude and degrading treatment she believed her job was threatened;
>
> (e) that her employer was oblivious to her obvious difficulties and failed to do anything about them, notwithstanding that she complained about not being treated fairly or with consideration, and notwithstanding that her employer was aware that she was being harassed;
>
> (f) that her employer failed to accommodate her hearing impairment;
>
> (g) that her employer sought to speak to her and obtain medical information after she stopped working;
>
> (h) about the termination of her employment; and
>
> (i) that she has been discriminated against on the basis of race and physical disability (i.e. her hearing loss).

14. From time to time the complainant orally informed the City's Human Resources Department that she was being treated unfairly. She claimed that the City's management too was aware of her concerns, but took no corrective action. The complainant was unable to work, and eventually was terminated following the municipality's unsuccessful efforts to gather information about the complainant's reasons for remaining absent from work.

15. The Board determined that the complaint failed to disclose a *prima facie* case of a breach of subsection 50(1) of the Act. The Board noted that the complainant had not specifically indentified any health and safety concerns to the City, and had not given any indication to the City that she was seeking to enforce rights under the Act until she filed the complaint with the Board. Nor did she conduct herself in a manner suggestive of the exercise of statutory rights, although the Board accepted that workers need not even be aware of a specific statute or regulation in order to seek its protection. However, the Board said at paragraph 30, "[t]he worker must do SOMETHING to indicate the existence of a health and safety problem, even if she does not realize that what she is doing is invoking the Act." (emphasis in original) The Board concluded that, despite the application's pleadings to the effect that she had exercised her right to refuse unsafe work or

withdrew from the workplace in the exercise of her statutory rights, and, as a result, had been subjected to an unlawful reprisal, was not borne out by any supporting pleaded facts.

16. The panel in the *Scarborough* case went on to examine the Board's jurisdiction under section 50 of the Act in light of the earlier *Meridian Magnesium* decision. It pointed out that the Board's section 50 jurisdiction is limited to the adjudication of complaints that a worker has suffered reprisals because he or she has acted in compliance with or sought the enforcement of the Act or Regulations. It is not in the nature of a plenary jurisdiction to investigate or inquire into work refusals, allegations that a workplace is unsafe, claims that a worker has suffered a work-related injury or disability or human rights violation, or that other sections of the Act have been breached. There are other legal avenues and forums, quite apart from a Board adjudication of a section 50 reprisal application, open to workers with those kinds of concerns. The panel acknowledged that workplace hazards may be physical or non-physical, but noted that the Act is primarily concerned with physical hazards and the physical effects inherent in workplace hazards, and that, at paragraph 43, the mechanisms created by the Act for investigation and enforcement "are poorly suited to dealing with non-physical hazards or effects." At paragraph 44, the Board observed:

> 44. However important issues of workplace discrimination, harassment or "poisoned environment" are, and however much these may affect the actual health, safety or well-being of a worker, it is apparent that the legislative treatment of these non-physical "hazards" is different from the legislative treatment of physical hazards. The Board's jurisdiction under section 50 of the *Occupational Health and Safety Act* must be addressed in the context of this complex legislative and adjudicative scheme. …

17. At paragraph 45 of the *Scarborough* decision, the panel went on to observe that, though the Board will not necessarily decline to inquire into a section 50 reprisal complaint merely because there are factual assertions of harassment and discrimination, "where the 'pith and substance' of the complaint concerns harassment or discrimination, it is generally appropriate for the Board to dismiss a section 50 complaint in the exercise of its discretion under subsection 50(2)."

18. The allegations of fact in *Amdahl Canada Ltd.*, [2000] O.L.R.D. No. 918 (April 18, 2000) were similar to those in this matter. Rachelle Martin alleged that she was the subject of negative, harassing and hostile comments and provocation not by her superior, but by her co-workers, which resulted in stress, anxiety and a decline in her health. Ms. Martin made her concerns known in writing to the employer on two occasions, once in the course of completing her comments in response to her performance evaluation, and once via a memorandum to her supervisors. She complained of being humiliated and demoralized by the behaviour of her co-workers. Shortly after she issued her memorandum, she was terminated from employment. Like the applicant in this matter, Ms. Martin claimed that her termination was a reprisal because she had acted in compliance with or sought the enforcement of the Act in seeking relief from the alleged harassment, which she characterized as a workplace hazard.

19. The Board dismissed Ms. Martin's complaint. At paragraph 32 of the decision, the Board characterized the hazard complained of as "equivalent to 'not getting along with a supervisor', which as the Board stated in CENTRO DONNE INC., is not a 'physical hazard' and does not fall under the OHSA."

20. The applicant contends in her application that she felt unsafe, embarrassed and mortified by Mr. Baird's conduct. She goes on to assert in paragraph 20 of Schedule "A" of the application that she "brought the unsafe working conditions to the attention of Nichols and Whitehouse on or about September 8, 2008." At paragraph 26 of counsel for the applicant's written submissions, he states that "the Applicant felt threatened and unsafe in the workplace as a result of the treatment she endured at the hands of the Respondent; such concerns were clearly and unequivocally articulated to her supervisor." However, the applicant does not say how she specifically characterized her concern when she brought them to the employer's representatives. She does not plead, for example, that she told Nichols and Whitehouse that she felt unsafe or that she felt her safety in the workplace was compromised as a result of Mr. Baird's conduct. There is no evidence offered by the applicant to support the bald assertion that she clearly and unequivocally articulated a concern for her personal health and safety. Nor does her letter of November 14, 2008 make any such assertion. It speaks of "verbal abuse", and the humiliation suffered by its public airing. It alludes to a "hostile work environment". It asserts that adults ought not to speak to one another as Mr. Baird had allegedly done. But the applicant does not say in the letter that she felt that her health and safety were threatened, or that she had previously characterized "the situation" as a health and safety concern when discussing it earlier with the employer's representatives.

21. Moreover, it is conceded by counsel for the applicant at paragraph 25 in his written submissions that the applicant did not explicitly state that she believed the conduct complained of constituted a violation of the Act. I accept counsel's submission that it is not necessary that an employee refer to the Act in order to be seeking its enforcement. However, to repeat the Board's observation in the *Scarborough* decision, "[t]he worker must do SOMETHING to indicate the existence of a health and safety problem, even if she does not realize that what she is doing is invoking the Act."

22. I conclude that, based upon the applicant's pleadings and her counsel's submissions, the applicant has not done or said anything to indicate the existence of a health and safety problem. The pith and substance of the complaint is that the applicant was unjustly terminated from employment for complaining of Mr. Baird's verbal abuse, which she found deeply insulting, demeaning and humiliating and which caused her considerable stress. The applicant's concerns are not properly framed as a section 50 reprisal application. The enforcement and investigative mechanisms under the Act are poorly suited to deal with allegations of workplace bullying and the kind of interpersonal conflict highlighted in this application.

23. Subsection 50(3) of the Act gives the Board a discretion to inquire into a complaint filed under subsection 50(2). In previous cases, including the *Meridian Magnesium* decision, the Board has declined to inquire into an application under section 50 in circumstances where the concern raised by the applicant was not in essence related to occupational health and safety, but rather arose from some other kind of workplace dispute. See, for example, the discussion at paragraphs 26 to 30 in *Chubb Security Systems, a division of CSG Security Inc.*, [2006] O.L.R.D. No 214 (January 20, 2006).

24. In my view, the pith and substance of this dispute is not a concern about the applicant's health and safety. It is in reality a concern about workplace bullying. Such an issue is not appropriately dealt with by the Board in the context of a section 50 reprisal application. For these reasons, the Board hereby exercises its discretion under subsection 50(3) of the Act not to inquire into this complaint.

25. The application is dismissed.

0496-09-R Eric Paradis, Applicant v. Labourers' International Union of North America, Ontario Provincial District Council, on its own behalf and on behalf of all other affiliated bargaining agents, Responding Party v. **White Contracting Ltd.**, Intervenor

Construction Industry – Practice and Procedure – Termination – The union was certified on November 14, 2008 – Although the Board received the application for termination on May 15th, pursuant to the Rules, the application was filed on May 14, 2009, the day the applicant sent it by Priority Courier – Pursuant to s. 132(1) an application is untimely if made within 6 months of certification – The Board found it was clear (according to common law and the *Legislation Act*) that the 6 month period began on November 15th and expired May 14th at midnight – Therefore the application was untimely, having been made on the last day of the six month period – Application dismissed

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD: June 16, 2009

1. The Board by decision dated May 22, 2009 in this application under section 132 of the *Labour Relations Act, 1995*, S. O. 1995, c. 1 as am. (the "Act") for a declaration terminating the bargaining rights held by the responding party noted the bargaining unit for which the applicant sought the declaration is construction labourers employed in the industrial, commercial and institutional sector in the province of Ontario and in all other sectors in the District of Algoma.

2. The Board in that decision observed at paragraph 5 that the application in relation to the industrial, commercial and institutional sector in the province of Ontario was clearly untimely. The Board then made the following comment in respect of the application in relation to all other sectors in the District of Algoma:

> Section 132(1) of the Act does permit an application for a declaration terminating a trade union's bargaining rights if the union, after being certified, does not enter into a collective agreement with the employer within six months. Thus, unless the responding party and intervenor are parties to a collective agreement in respect of all sectors of the construction industry other than the industrial, commercial and institutional sector in the District of Thunder Bay, and no conciliation officer has been appointed, then this application would appear to be timely in respect of employees working outside the industrial, commercial and institutional sector in the District of Thunder Bay.

The Board did not find the application was timely, but rather simply noted that the application "would appear to be timely."

3. The Board at paragraph 10 of that decision requested the parties' submissions when it wrote:

> The Board therefore directs the applicant to advise the Board whether he wishes to proceed with this application, and if so, to provide submissions as to why this application is timely. The applicant's submissions must be filed with the Board and delivered to the other parties on or before June 2, 2009. The responding party and intervenor, if they wish to make submissions in reply with respect to the timeliness issue must file their submissions with the Board and deliver them to the other parties on or before June 8, 2009.

The applicant advised he wished to proceed with the application in respect of all sectors other than the industrial, commercial and institutional sector in the District of Algoma.

4. The responding party was certified on November 14, 2008. This application was filed on May 14, 2009 when the applicant sent it by Priority Courier to the Board on that day. The Board received the application on May 15, 2009. Rule 3.4 of the Board's Rules of Procedure provides:

> Except for applications covered by Part V [Construction Industry] of these Rules, the date of filing is the date a document is received by the Board at its office.

This application is made under section 132 of the Act and is covered by Part V of the Board's Rules. Rule 26 applies to applications made under section 132 and is in Part V. Rule 24 governs the filing and delivery of applications relating to the construction industry. Rule 24.2 provides:

> The date of filing is the date that a document is received by the Board. However, if an application is sent by Priority Courier, the date of filing is the date on which the application is sent (as verified by the Post Office).

Although the Board actually received the application on May 15th, it was filed on May 14th.

5. The responding party submits the application, having been filed on May 14, 2009 is untimely as it was filed before the time prescribed by section 132(1) of the Act had expired. Section 132(1) of the Act provides:

> If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

Section 132(1) of the Act gives an employer and trade union in the construction industry six months from the date of certification to attempt to reach a collective agreement without having to deal with an application to terminate the union's bargaining rights. An application filed within that six month period is therefore untimely and would have to be dismissed.

6. The applicant and intervenor point out there was no collective agreement in operation at the time this application was made. There is no dispute that at the time the application was made, no conciliation officer was appointed, although the Minister did appoint a conciliation officer by letter dated May 27, 2009. There is no doubt that if May 14, 2009 was more than six months after the responding party was certified, this application would be timely.

7. The timeliness issue raised by the responding party depends on whether the application was made within six months after the responding party was certified or after that six month period.

8. The six month period established by section 132(1) of the Act is an important component of the structure within which collective bargaining between a certified union and an employer occurs. As the Board observed in *Evans Lumber and Builders Supply Ltd.*, [2005] OLRB Rep. Nov./Dec. 948 (December 7, 2005) at 953:

> In barring applications for certification and termination during certain periods of time it facilitates the process of collective bargaining by ensuring that the union and the employer will not be distracted during those periods of time.

A similar principle was set out by the Board in *Connie Steel Products Ltd.*, [1987] OLRB Rep. Oct. 1225 when the Board wrote at page 1226:

> Sections 57 [now 63] and 61 [now 67] are reflective of a statutory scheme which attempts to achieve stability in labour relations. Employees can change their bargaining agent or elect to terminate their union's bargaining rights only during certain periods of time as provided for in the Act. A system in which employees could affect changes to representation rights whenever they wanted would be extremely unstable and could seriously harm the collective bargaining interests of all concerned.

While the Board in *Evans Lumber and Builders Supply Ltd.* and *Connie Steel Products Ltd.* was dealing with applications made under what is now section 63(2) of the Act, that same analysis is applicable to interpreting section 132(1).

9. Therefore, the question the Board must answer is whether May 14, 2009 is within six months or more than six months after November 14, 2008, the date on which the responding party was certified.

10. The Act does not provide any guidance to the correct answer. The responding party referred to several authorities, including Black's Law Dictionary, which defines the term "month" as follows:

> ... "month" unless otherwise defined, means "calendar month" or time from any day of any of the months as adjudged in the calendar to the corresponding day, if any, ... of the next month.

That approach to the calculation of when a period of time ends that is calculated by reference to months has been applied by the courts of Ontario for more than 100 years. In *Ostrom v. Township of Sidney*, (1888), 15 O.A.R. 372 the Ontario Court of Appeal adopted the approach taken in *Freeman v. Read*, 4 B. & S. 174 which stated:

> It has been well settled that the calendar month required by statute begins at midnight on the day on which the notice was given, and generally ends at midnight of the day with the corresponding number of the next ensuing month in the calendar.

Guidance for the correct calculation of a time period measured in months is also found in the *Legislation Act, 2006*, S. O. 2006, c. 21 which provides in section 86(6):

> If a period of time is described as a number of months before or after a specified day, the following rules apply:
>
> 1. The number of months are counted from the specified day, excluding the month in which the specified day falls.
>
> 2. The specified day is excluded.
>
> 3. The period includes the day in the last month counted that has the same calendar number as the specified day or, if that month has no day with that number, its last day.

11. Thus, it is clear the six month period referred to in section 132(1) of the Act began November 15, 2008, the day after the responding party was certified and expired May 14, 2009 at midnight. This application for a declaration terminating the responding party's bargaining rights was filed on May 14, 2009. Therefore the application was made within that six month period, albeit on the last day of that period, and is therefore untimely.

12. This application must be dismissed.

1356-07-R CUPE, Local 145, Applicant v. **William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc.**, Responding Parties

Bargaining Unit – *Prima Facie* Motion – Related Employer – CUPE sought a declaration that the three responding parties constitute a single employer under section 1(4) of the Act – A collaboration involving William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and Carillion Services Inc. resulted in WOHC contracting out certain work to CSI – Certain WOHC employees were as a result terminated and re-hired by CSI – The identical collective agreement applied to both the remaining WOHC employees and the transferred employees but the bargaining structure was altered to form two bargaining units – The issue was whether the Board should exercise its discretion to make a related employer declaration in order to preserve a particular bargaining structure – The responding parties moved that the application be dismissed on the grounds that the applicant had not pleaded a *prima facie* case – The Board found that the parties had clearly turned their minds to the management of contracting out in the very circumstances of this case – There was no evidence of mischief, no suggestion the bargaining unit would be subject to further fragmentation and no facts pleaded that would indicate an inability on the union's part to fully engage in the collective bargaining process – The Board will not exercise its discretion to make a related employer declaration merely to preserve a bargaining structure – Application dismissed

BEFORE: *Kevin Whitaker*, Chair.

APPEARANCES: *Mark Wright* appeared for the applicant; *Robert Little* appeared for William Osler Health Centre; *D.J. Shields* appeared for The Healthcare Infrastructure Company of Canada Inc.; *D.J. Shields* and *Drew Johnston* appeared for Carillion Services Inc.

DECISION OF THE BOARD: May 13, 2009

I

What This Case is About

1. This is an application for a declaration that the three responding parties constitute a single employer for purposes of section 1(4) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The circumstances arise from restructuring in the hospital sector.

2. The applicant states that such a declaration is required for three reasons;

(i) to prevent the erosion of employee mobility rights;
(ii) to prevent the fragmentation of the bargaining unit; and
(iii) to permit bargaining between the union and the employer entity that exercises true control over the enterprise.

3. The responding parties request that the application be dismissed before hearing the merits. The respondents suggest that even if the facts pled by the applicant are true, the Board should decline to exercise its discretion under section 1(4) of the Act to provide the relief sought.

4. For reasons which follow, the Board declines to exercise its discretion under section 1(4) of the Act. This application is dismissed.

II

The Facts

5. For purposes of the preliminary issue, facts alleged by the applicant are presumed true.

6. The union represents a bargaining unit of full and part time "service" employees at William Osler Health Centre ("WOHC"), a public hospital. The union and the WOHC are bound by both a "central" collective agreement and a "local" collective agreement.

7. The WOHC was formed in 1998 as an amalgamation of the Georgetown and District Memorial Hospital, the Etobicoke General Hospital and the Brampton Memorial Hospital, all becoming individual sites at the WOHC.

8. In 2005, the Georgetown site was transferred to Halton Health Care Services, leaving only the Etobicoke and Brampton sites at the WOHC.

9. At the time of the application, a new Brampton facility has been built – the Brampton Civic Hospital. The old Brampton site (the Brampton Memorial Hospital) is scheduled to close and its operations are to be transferred to the new site.

10. The respondent The Health Care Infrastructure Company of Canada ("THICC") is a private, "for profit" corporate consortium. It is organized to carry out partnerships with public and private sector entities in different aspects of hospital construction, operations and services. These are known as "P3" undertakings.

11. The WOHC and the THICC are partners in a P3 arrangement where THICC is to design, construct, finance, operate, property manage and maintain the new Brampton facility. THICC is also to provide certain non-clinical support services including building and facility maintenance, housekeeping, linen and laundry, portering, security, materials management and food services. These services are to be provided in the new facility and to some extent in the rest of the WOHC.

12. To this end, on August 28, 2003, WOHC and THICC entered into a Project Agreement of 28 years in duration with 3 years of construction and 25 years of service provision. The Project Agreement permits THICC to subcontract its obligations.

13. The respondent Carillion Services Inc. ("CSI") is a private "for profit" corporation and a controlling member of the THICC consortium along with two other entities.

14. THICC and CSI have entered into a services contract which provides for the provision of non-clinical services by CSI at the new Brampton facility and food services and materials management at the Etobicoke site.

15. The Project Agreement expressly provides WOHC with a large and significant degree of control over the manner in which THICC carries out its responsibilities under the Project Agreement. This significant degree of control extends to the terms and conditions of employment of THICC and CSI employees and the nature of the relationship between THICC and CSI.

16. The WOHC, THICC and CSI represent themselves to the public as a single integrated enterprise.

17. In the Fall of 2007, employees working in the old Brampton site, and in food services and materials management in the Etobicoke site were terminated by WOHC and hired by CSI. These employees were either transferred to the new Brampton site or remained at the Etobicoke site.

18. At the time of hearing there were roughly 600 employees who remained employed by WOHC and 500 employed by CSI.

19. Article 20 of the collective agreement and Schedule 29 of the Project Agreement provides that THICC/CSI are bound by the collective agreement that was negotiated between the union and WOHC and must enter into an agreement with the union to that effect. Further, that THICC/CSI must recognize the service of former WOHC employees now employed by them and that all such employees must participate in the Hospitals of Ontario Pension Plan as they did as employees of WOHC.

20. These provisions have been honoured and all employees of THICC/CSI continue to be governed by the identical collective agreement, terms and conditions of employment that existed for them as employees of WOHC.

21. Article 10 of the collective agreement between the union and WOHC provides that the employer may contract out work usually performed by members of the bargaining unit if the employer provides in its commercial arrangement that the contractor must employ displaced employees under the provisions of the collective agreement and enter into a collective agreement to that effect. This provision has been honoured.

22. A letter of understanding in the collective agreement between the union and WOHC provides that employees who are displaced to another employer shall retain their service and seniority with WOHC for a 24 month period, may post for vacancies that arise at WOHC for this period and if successful, return to employment with the WOHC.

23. A hearing in this matter took place on October 22, 2008 at which time the Board heard the parties' submission on the motion to dismiss the application.

24. On December 4, 2008, the applicant wrote to the Board enclosing a letter from CSI to one of the employees in the bargaining unit. The letter indicated that CSI had learnt that this employee was also a part time employee of WOHC and that CSI "does not allow their employees to be employed with WOHC…".

25. Counsel for the applicant suggested that this letter demonstrates that CSI and WOHC are not distinct employers and secondly, that it illustrates why the Board should hear the application on the merits.

26. Counsel for WOHC responded by letter of December 9, 2008. Counsel explained that at a meeting on September 9, 2008, WOHC advised the union expressly that WOHC permits part time employees to also be employed at CSI, that it is a fact that should have been raised at the hearing as the applicant union was aware of the issue having been discussed before, and that even if true, is not relevant to the issue argued before the Board.

27. Counsel for CSI responded by letter of January 5, 2009. Counsel adopted the submissions of WOHC, advised that the letter to the employee of December 2, 2008 had been sent inadvertently and that CSI had confirmed to the union that employees of CSI were permitted to work at WOHC.

III

The Issues

28. The union takes the position that the responding parties are under common direction and control, and that the Board should exercise its discretion to so declare. Further it is suggested that there are three particular reasons why the discretion should be exercised;

(i) to prevent the erosion of employee mobility rights;
(ii) to prevent the fragmentation of the bargaining unit; and
(iii) to permit bargaining between the union and the entity that exercises true control over the enterprise.

29. The respondents argue in reply that there is no common direction and control but in any event even if there were, the Board should not exercise its discretion to provide the declaratory relief sought by the applicant.

30. More particularly, the respondents suggest that the parties themselves in article 10 and in the Letter of Understanding have turned their minds precisely to the management of the present circumstances and that it would be inappropriate for the Board to interfere with their bargain. Further, it is submitted that the discretion under section 1(4) should not be exercised only for the purpose of preserving a particular bargaining structure.

31. The narrow question before the Board then is assuming all of the facts as alleged by the applicant as true, would the Board in this case exercise its discretion under section 1(4) of the Act to declare the responding parties to be one employer for purposes of the Act?

Section 1(4)

32. Section 1(4) of the Act was introduced in 1971. Essentially, the section permits the Board to treat multiple employers as a single employer where it is necessary to accomplish a labour relations objective:

> Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

33. Early on, it was understood that if employer entities were under "common control or direction", the Board could exercise a discretion to issue a declaration under section 1(4) where it made labour relations sense to do so. This meant that there were really two types of inquiries to be made under the section: are there multiple entities under common control and, if so, should the discretion to so declare, be exercised?

34. This two step analysis was described by the Board in *Walters Lithographing Company Limited*, [1971] OLRB Rep. July 406, where the Board enumerated a list of factors to consider in determining the threshold question of whether employer entities were under common control or direction.

35. The Board's analysis of the factors to be considered in the inquiry into whether employer entities are under common control or direction was significantly refined in *Ontario Legal Aid Plan*, [1989] OLRB Rep. Aug. 862; [1990] OLRB Rep. Jan. 118 (Div. Ct.); (1991) 6 O.R. (3d) 481 (C.A.).

36. In a variety of cases, the Board has elaborated on how the discretion under section 1(4) should be exercised if the threshold requirements of common care or control are met.

37. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, the Board observed that the discretion under section 1(4) should be exercised to preserve established bargaining rights:

> 12. ... Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union and the contractual rights of its members will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. In this respect the purpose of action 1(4) is similar to that of [now section 69] which preserves the established bargaining rights and collective agreement when a "business" is transferred from one employer to another. Section [69] has been part of the scheme of the Act since the mid 1960's. Neither remedial provision requires a finding of anti-union animus; their primary application is to BONA FIDE business transactions which incidentally undermine or frustrate established statutory rights.

38. More recently in *Carpenters and Allied Workers Local 27 v. Toronto (City) and Toronto Parking Authority*, [2000] O.L.R.D. No. 1687 (Q.L.) (June 15, 2000), the Board described the purpose behind the use of the discretionary power to be the prevention of the "erosion" of bargaining rights:

> 19. In this case, the Board finds that even if the legal and factual foundation for a section 1(4) declaration were made out, it would not exercise its discretion and declare the TPA and Toronto to be a single employer for the purposes of the Act. The reasons are quite simple; this case does not disclose any of the "mischief" which section 1(4) was intended to remedy. At its most basic, section 1(4) is in place to ensure there will be no erosion of bargaining rights caused by a unionized entity spinning off a new company, moving work or opportunities for growth from the old company, and operating the new company without regard to the collective agreement obligations of the old. The mischief in such an arrangement is obvious and this labour relations "sleight of hand" is remedied by the Board's discretion to make both companies a single employer for the purposes of the Act.

39. In the present case, the parties disagree about the appropriate breadth of the use of the Board's discretion. The applicants argue that the Board's discretion should be used to preserve a particular bargaining structure. The respondents disagree. The respondents submit that section 1(4) is intended to preserve bargaining rights, but not to lock in or preserve any particular bargaining structure.

40. Certainly there is support for both propositions in the Board's past decisions.

41. In *Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214, in a case dealing with the retail grocery industry, the Board exercised its discretion under section 1(4) for the stated purpose of preserving a particular bargaining structure. At paragraph 56, the Board explained why in that particular case, there was a labour relations purpose to be served in using section 1(4) to prevent an alteration to the bargaining structure:

> 56. There is another, secondary reason for granting this relief rather than leaving the union to deal separately with several successor employers. When operated by Dominion, the store on Burnhamthorpe Road was part of a province-wide

> bargaining structure. A change in legal form, such as a franchise scheme, which does not shift the seat of real economic control, ought not to break up a bargaining structure created by the parties through the process of collective bargaining. In other words, the province-wide bargaining structure merits preservation primarily because it is the *status quo* fashioned at the bargaining table. A consolidated structure also has public interest attractions, given the existence of common control. A proliferation of bargaining units increases the risk of unnecessary work stoppages. The likelihood of a strike occurring grows with the number of rounds of negotiations. And centralized bargaining is more likely to be conducted by professionals whose experience may enable them to avoid pitfalls. Industrial unrest may be heightened by competitive bargaining between two unions; and several small units enhance the probability a rival union will appear on the scene. A broadly-based structure may lower the cost and thereby enhance the availability of insurance and benefits plans. Finally, the existence of a single unit facilitates equitable treatment of employees doing the same job. A related employer declaration could only serve to increase the probability that broad-based negotiations will continue. On an application for certification, the Board has used section 1(4) to create a viable bargaining structure. In our view, the preservation of a consolidated bargaining structure created by the parties is an equally compelling reason for a related employer declaration.

42. The Board's decision in *Penmarkay* was expressly followed in *RPKC Holding Corporation*, [1986] OLRB Rep. June 828, a case also dealing with the retail grocery industry. At paragraph 106, the Board described its use of section 1(4) of the Act to preserve a broadly based bargaining structure in the face of employer efforts to fragment bargaining as a possible precursor to decertification.

> 106. Having concluded that RPKC and Willett (and, in view of the aforementioned admission, Dominion) are carrying on associated or related activities or businesses under common direction or control, we must now consider whether this is an appropriate case in which to exercise our discretion under section 1(4) to treat them as constituting one employer for the purposes of the Act. After carefully reviewing all of the evidence and the submissions of the parties, we have concluded that it is. As noted above, it is common ground among the parties that section 1(4) is designed to prevent the erosion of bargaining rights, to remove road blocks to viable structures for collective bargaining, and to ensure that the trade union representing employees is able to deal directly with the person or company possessing real economic control over them. In the present case, the Union, through what Mr. Collins described as "some very hard bargaining", succeeded in consolidating over forty separate bargaining units into a single bargaining unit in a collective agreement that covered over two-thirds of Dominion's Ontario stores, including the 1811 Avenue Road store. In an attempt to become more competitive in the market place, Dominion, through its subsidiary Willett, converted a number of those stores into Mr. Grocer franchises. However, as noted above, Dominion, through Willett, has retained a substantial degree of control over those stores and has placed itself in a position where it can maintain a presence in the retail food industry through those franchised stores, enabling it to continue to attempt to earn profits from retail food sales by a number of means, including royalty fees, advertising fees, income from wholesale products supplied to franchises, and ECR's retained in whole or in part on the products supplied to franchisees by RPKC or by authorized direct suppliers. Under those circumstances, we are of

> the opinion that it is eminently appropriate for the Board to exercise its discretion under section 1(4) for the purposes of preserving the Union's bargaining rights in the form of the broadly-based bargaining structure which it succeeded in obtaining from Dominion at the bargaining table. In this regard, it is not without significance that while enhanced prospects of decertification of the Union may not have formed any part of Dominion's motivation for embarking on the franchise programme, it clearly was a factor that was given considerable weight by Willett, through Mr. Ashton (who was one of Willett's two key personnel at the material time), in the implementation of the franchise programme. Moreover, it is evident that Mr. Prittie, Willett's Franchise Manager, counselled some prospective franchisees (other than Mr. Ferencz) concerning decertification, and used decertification as a selling point in his dealings with them. In the case of Mr. Ferencz, a question concerning decertification was raised early in his franchise discussions with Willett and he was advised to seek outside advice. Since Mr. Ferencz's evidence concerning what Mr. Blair told him was quite vague, and none of the other persons in attendance at that meeting was called to testify in these proceedings, there is a dearth of reliable evidence concerning what Mr. Ferencz was told in this regard by Dominion's former Director of Labour Relations. However, as noted above, there is nothing in the evidence before the Board to suggest that Mr. Ferencz lost interest in having the Union decertified.

43. In *White Spot Limited*, BCLRB No. B191/95, 33 CLRBR (2d) 1, the British Columbia Labour Relations Board described the purposes behind their comparable "related employer" provisions in sections 35 and 38 of the British Columbia Labour Code. In this case which dealt with franchised restaurants, the B.C. Board endorsed the analysis in *Penmarkay* at paragraph 196. At paragraph 203, the Board confirmed:

> 203. The maintenance of the current collective bargaining structure is consistent with the preservation of rights under section 38, and is also consistent with the goal of industrial stability under the Code. To proceed from one bargaining unit and one collective agreement to multiple bargaining units with different parties, each attempting to obtain a different result, would inevitably result in a greater potential for work stoppages. From the findings of the original panel it appears that 10 of the 17 certified restaurants are to be franchised. This would not make for stable labour relations.

44. In *Canadian Red Cross Society*, [2001] O.L.R.D. No. 2600 (Q.L.) (June 29, 2001), at paragraph 48, the Board expressly stated that section 1(4) is not intended to be used to facilitate any particular bargaining structure:

> 48. I can see that workers would likely be better off in a more centralized bargaining structure, with the union negotiating wage rates with the CCAC (Thunder Bay), pertaining to all of the service providers who obtain work from the CCAC (Thunder Bay). I recognize the union's concern that the effect of the CCAC (Thunder Bay)'s bidding process might be to create price competition between the different bidders whose primary variable commodity is the cost of their labour. That suggests the operators might feel compelled to push down the wages of their employees, as a means of becoming more competitive than their rivals. I can see that the union's endeavour to put wages out of competition is a desirable political objective for it. There would likely be greater stability in a large, over-arching bargaining structure which pertains to all homemaking

> service providers than there is in separate bargaining units for each service provider. An over-arching structure would seem likely to accord better with the "underlying economic and industrial relations realities" (*J.H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176, at 1184, para. 21). But the union cannot achieve the objective of a centralized bargaining structure through the aegis of the Board and its discretion under section 1(4) of the Act. That section is intended to address a mischief, described in *Toronto (City)* [2000] O.L.R.D. No. 1687, June 15, 2000. Its purpose is "to ensure there will be no erosion of bargaining rights caused by a unionized entity spinning off a new company, moving work or opportunities for growth from the old company, and operating the new company without regard to the collective agreement obligations of the old." The section is not there to facilitate the bargaining structure which would best advantage workers in their endeavours to achieve better earnings, working conditions and benefits. Rather, the section is there to address a specific and limited mischief, which does not appear to exist in this case.

45. In *Sobeys Capital Inc.*, [2001] OLRB Rep. September/October 1250 (September 28, 2001), the Board referred to *Penmarkay* and *White Spot* and observed that section 1(4) is not to be used only to preserve a particular bargaining structure:

> 133. Union counsel referred to the decision of the B.C. Labour Relations Board in *White Spot Limited*, above, in which a franchise arrangement was found to constitute one employer for the purposes of the B.C. Labour Relations Code. The BC Board said (at para. 55): 'We find that protecting the collective bargaining structure established between these parties is a goal contemplated by the Code and one which constitutes a labour relations purpose under the provisions of section 38 [of the BC Code]'. A section 1(4) declaration will likely be made to prevent the alteration of the form of collective bargaining (e.g. from corporate-wide bargaining to store-based bargaining) if the latter form undermines established bargaining rights. But such a declaration will not be made merely to maintain an established bargaining structure. The Board may have a preference for larger bargaining structures when determining bargaining units in a certification context, but, notwithstanding the Board's comment in *Penmarkay Foods* (at para. 56), the Board's bargaining unit preference is not a consideration when the Board exercises its discretion under section 1(4) – it is concerned with protecting bargaining rights, not the preferability of a particular bargaining structure. This is not a case where there has been an erosion of bargaining rights. Those employees who were covered by the Sobeys' collective agreement are still covered by collective agreements.
>
> 134. Similarly, the BC Board found (at para. 57) that the 'protection of collective bargaining rights attained through negotiating a single collective agreement', e.g. employee's rights of transfer and recall on layoff, is an even more important labour relations purpose which should trigger a related employer declaration. The Board applies section 1(4) differently. It will not make a section 1(4) declaration merely to maintain superior terms and conditions of employment. It will preserve bargaining rights, not the content of any collective bargaining arrangement.

46. In *City of Toronto*, 2006 CanLII 33974 (ON L.R.B.) (September 27, 2006) the Board declined to exercise its discretion under section 1(4) merely for the purpose of preserving a particular bargaining structure.

Should the Board Exercise its Discretion?

47. It is apparent that the parties in negotiating the provisions of article 10 of the collective agreement and the letter of understanding, contemplated that the employer could contract out work of the bargaining unit, that employees would be displaced, that they would be rehired by the contractor, that the contractor would enter into and be bound by the provisions of the collective agreement, that seniority and service with the hospital would be retained for 24 months and that job security provisions would permit displaced employees to move back to the hospital. In other words, the parties have negotiated provisions which expressly deal with the present circumstances giving rise to the union's complaint.

48. It is also apparent that these circumstances would only arise following a change in bargaining unit structure – that being one unit for those who remained hospital employees and one for those now employed by the contractor.

49. The parties have clearly turned their minds to the issue of the management of contracting out in the very circumstances of this case. Now that the parties have arrived at the place contemplated by the provisions of article 10 and the letter of understanding, (and the employer has assumed its bargained responsibilities), how then can it be said that there remains some mischief for the Board to remedy by exercising the discretion under section 1(4)?

50. Leaving aside the provisions of article 10 and the letter of understanding, what of the other grounds upon which relief is sought?

51. It might be said as the union claims, that there is a diminishment of "mobility rights" even though this has been dealt with to some extent by the provisions of the article 10 and the letter of understanding. As in the *City of Toronto* case however, it is too speculative to say that overall this works to the disadvantage of employees in the bargaining unit and that there is some mischief to remedy. If, for example, there were to be layoffs in one of the bargaining units but not the other, employees with low seniority in the one bargaining unit might then enjoy greater job security than if there was one larger bargaining unit.

52. Similarly, it is too speculative to say that the recent change in bargaining unit structure will precipitate fragmentation. There are no facts pled which would permit the conclusion that the bargaining structure is to be further fragmented or that the current move from one to two bargaining units has threatened in any way the integrity of the bargaining process. It might be different if these two current large units were further broken down through contracting out - but those are not the facts.

53. With respect to the issue of being able to bargain with the entity that exercises true control over the enterprise, there are no facts pled by the union which suggest that the union is unable to fully engage the collective bargaining process, to enforce and manage the collective agreement either on a day-to-day basis or in the bargaining process itself.

54. Accepting the union's alleged facts for purposes of this preliminary motion, the Board concludes that the union's bargaining rights are not being eroded, threatened, undermined or in any way diminished. Aside from the fact that there are now two bargaining units where before there was one, there is no suggestion that this change will inhibit the continuation of a viable collective bargaining relationship. Unlike the *Penmarkay* case noted earlier, there is no lingering suspicion of

anti-union animus or bad faith. There is nothing to suggest that this is the first step down a slippery slope designed to de-stabilize the collective bargaining relationship.

55. What has occurred here is a reconfiguration of bargaining structure. Persons who were employees of WOHC and now of CSI enjoy the very same rights and entitlements that they had as employees of WOHC. The collective agreement between CSI and the applicant expressly permits those who are now CSI employees to maintain their WOHC seniority for two years and to post into vacancies at WOHC for this period.

56. Dealing with the circumstances raised in the post-hearing correspondence, it is difficult to see how these facts are relevant to the issue before the Board. Although it would appear that both WOHC and CSI have stated "on the record" that employees are free to work for both employers at their option, what would permit clearly unrelated employers from taking similar positions with respect to for example, competitors? The mere fact that an employer purports to enforce a rule which would restrict outside employment does not by itself indicate that there is some purpose to be served by having the Board issue a single employer declaration. The remedy, if this is indeed an issue, is to deal with this matter through the grievance process.

IV

Disposition

57. Having presumed the union's alleged facts true for purposes of the responding parties' preliminary motion, the Board concludes that there is no appropriate purpose to be served in exercising its discretion to declare the responding parties to be a single employer for purposes of the Act.

58. This application is dismissed.

COURT PROCEEDINGS

2222-04-ES; 2223-04-ES; 2224-04-ES (Court File No. C48942) Abdurahman Abdoulrab, Josephine Andres, et al –and– OLRB, Novaquest Finishing Inc., Catelectric Inc., 406186 Canada Inc. and the OLRB

Employment Standards – Judicial Review – Related Employer – Termination – Three companies appealed the ESO's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C," a bankrupt company, and should be treated as one employer pursuant to s. 4 of the Act – The Board found that s. 4 requires a finding that both subsections (a) and (b) be answered positively, and that there must be a causal connection between the "relatedness" of the companies and the insolvency before there is a declaration of one employer under the section – The Board allowed the application (see [2006] OLRB Rep. March/April 248) – The application for judicial review was dismissed by the Divisional Court (see [2007] OLRB Rep. July/Aug 842) – First, the Court of Appeal noted the legislative mandate that the courts "not overturn a

decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable," and made it clear that it did not accept the applicants' argument that "the Divisional Court erred in failing to articulate first what in its view would be the correct interpretation of s. 4 before conducting its reasonableness analysis" – Second, the Court was not persuaded that the OLRB's decision under the current ESA "can be characterized as fitting into two competing incompatible lines of authority" and accordingly found it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions – Finally, the court reiterated that a reasonable decision must be "justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" – The court found the Board's decision met that standard – Appeal dismissed

Court of Appeal for Ontario, Simmons, Blair and Juriansz JJ.A., June 18, 2009

I. OVERVIEW

[1] The appellants are former employees of Catelectric-Dip Corporation ("Cat-Dip"). Their employment was terminated on December 19, 2003, shortly before Cat-Dip went into bankruptcy on January 19, 2004. They did not receive the severance and termination pay to which they were entitled under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "ESA"). They appeal from the decision of the Divisional Court dismissing their application for judicial review of a decision of the Ontario Labour Relations Board[1]. The Board had overturned the decision of an employment standards officer which concluded that the three corporate respondents should be jointly and severally liable as related employers to pay the appellants' termination and severance pay pursuant to s. 4 of the ESA.

[2] The appellants do not attack the Board's factual findings or the Divisional Court's treatment of those findings. Further, they recognize that the Board is protected by the privative clause in s. 119(13) of the ESA. They submit, however, that the Divisional Court erred in upholding the decision of the Board as reasonable. Instead, they submit that the Divisional Court should have found that the Board erred in its interpretation and application of the related employer provisions in ss. 4(1) and (2) of the ESA.

II. FACTS

The purchase of Cat-Dip and the financing arrangement

[3] Cat-Dip, an electroplating company, was originally owned by a division of Decoma International ("Decoma"), a member of the Magna family of automotive companies. It had about 150 full-time permanent employees. In March 2002, David Lund bought Cat-Dip from Decoma. He was already the owner of another electroplating company, Novaquest Finishing Inc. ("Novaquest").

[4] At the time of the Cat-Dip purchase, Mr. Lund incorporated a holding company, 4064186 Canada Inc. ("406"), to hold all the shares of Cat-Dip and Novaquest. Mr. Lund held all the shares of 406. The Board accepted Mr. Lund's testimony that this arrangement came about largely at the request of his and Novaquest's banker, the Bank of Montreal ("BMO"). BMO established all of its financial arrangements with 406. BMO extended credit facilities to 406, the holding company,

secured by all of the assets and receivables of Novaquest and Cat-Dip, the operating companies. Each day, 406 "scooped" all of the money deposited in Novaquest and Cat-Dip and, in turn, provided all of their necessary operating funds. BMO was not concerned with the performance of Cat-Dip in isolation. Instead, BMO was concerned about whether 406 was meeting the covenants established as part of the financing arrangement and whether the operating companies were performing in a manner which ensured that BMO's security was adequately protected.

Cat-Dip's business problems leading up to bankruptcy

[5] In 2003, Cat-Dip began to experience business problems after losing some of its key customers. One of the primary reasons for its difficulties in maintaining profitability was that its employees' wages were approximately 25% – 30% higher than at Novaquest.

[6] In September 2003, BMO advised 406 that it was $1.6 million "out of margin" and was borrowing in excess of the ratio of receivables it had covenanted to maintain. BMO refused to provide any more money and expected 406 to return quickly to margin. Further, BMO moved the 406/Novaquest/Cat-Dip financial situation to its "special accounts department" and counselled Mr. Lund to hire more sophisticated financial advice.

[7] Mr. Lund hired Mr. Reid, a Chartered Accountant, as the Chief Financial Officer for 406 in September 2003. At the time he was hired, 406 did not have enough funds available to meet the next payroll for the employees of Novaquest and Cat-Dip. Mr. Reid testified that the financial problems were serious. That same month, Cat-Dip lost one of its larger key customers and temporarily laid off 28 employees. In November 2003, BMO retained Richter and Partners ("Richter") to monitor the group of companies.

[8] As BMO refused to advance any further funds, Mr. Lund borrowed approximately $2.5 million from family members in September and October 2003 in exchange for promissory notes. Although the loans were intended to allow Cat-Dip to continue operating, they were made to Novaquest and secured by Novaquest's assets. The funds were then moved into the accounts of 406 and used to defray Cat-Dip's operating costs.

[9] In the fall of 2003, Mr. Lund and Mr. Reid made concerted efforts to locate new customers for Cat-Dip and to streamline the company's operations. However, despite those efforts, Cat-Dip continued to lose money. Mr. Lund and Mr. Reid held discussions with Richter about the options available for Cat-Dip. They ultimately retained Richter as the Trustee in Bankruptcy to advise them on the possibility of making a proposal to creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). Richter recommended offering $195,000 to unsecured creditors, which amounted to approximately ten cents on the dollar.

[10] On December 19, 2003, Cat-Dip sent notices to all its employees advising them that their employment had either been terminated or that their employment could continue at a lower wage rate. In total, approximately 100 employees lost their employment that day. Many of these employees had worked for Cat-Dip for a long time, some as long as 20 years.

[11] The termination triggered the termination and severance pay provisions of the ESA. Terminated employees were entitled to termination pay of one week's wages for each year of service to a maximum of eight weeks and to severance pay of one week's wages for every year of service.

Cat-Dip's bankruptcy and the launch of Catelectric Inc.

[12] On December 29, 2003, Cat-Dip filed a proposal under the BIA. The primary unsecured liability of Cat-Dip was its debt to terminated employees. On January 19, 2004, a meeting of creditors was held. The unsecured creditors were offered approximately 12 cents on the dollar. Richter advised that if the proposal was rejected, the unsecured creditors would receive nothing because BMO's secured claims against Cat-Dip far exceeded the value of Cat-Dip's assets. Despite Richter's advice, the majority of the creditors, made up of the employees, voted against the proposal. As a consequence of the rejection of the proposal, Cat-Dip went into bankruptcy.

[13] Richter, the Receiver and Trustee in Bankruptcy, intended either to shut down Cat-Dip temporarily or to liquidate it immediately. A few hours after Cat-Dip went into bankruptcy, Mr. Lund incorporated a new company, Catelectric Inc. ("Catelectric"), and obtained $1,775,000 in financing; the funds were drawn in part from his own assets and loans from his family. He then purchased the assets of Cat-Dip at their appraised value, which was considerably less than the amount of BMO's outstanding secured debt.

[14] Catelectric began to operate immediately. In fact, the Cat-Dip employees who remained with Catelectric did not even cease working. They continued to work at the same location, on the same machines, and on the same projects, for Catelectric.

Cat-Dip employees' claims and the decision of the Employment Standards Officer

[15] Several of the employees terminated by Cat-Dip filed claims with the Employment Standards Branch of the Ministry of Labour for their termination and severance pay, alleging that Novaquest, 406, and Catelectric were related employers within the meaning of s. 4 of the ESA. An employment standards officer determined that $983,942.68 was owed to these employees and that Novaquest, 406, and Catelectric were jointly and severally liable as related employers to Cat-Dip under s. 4 of the ESA. Orders to pay were therefore made against the three companies. The three companies then filed applications with the OLRB for review of the orders to pay.

Review of the employment standards officer's decision by the Board

[16] On the applications to review the order of the employment standards officer, the Board's task was to determine whether Novaquest, 406, and Catelectric were related employers within s. 4 of the ESA. Section 4(1) of the ESA provides:

> Subsection (2) applies if,
>
> > (a) associated or related activities or businesses are or were carried on by or through an employer and one or more other persons; and
> >
> > (b) the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act.

[17] Section 4(2) of the ESA provides that the employer and the other person or persons described in subsection (1) shall be treated as one employer for the purposes of the ESA.

[18] Section 4(5) of the ESA states:

> Persons who are treated as one employer under this section are jointly and severally liable for any contravention of this Act and the regulations under it and for any wages owing to an employee of any of them.

[19] In its decision dated October 26, 2005, the Board found that Novaquest, 406, Catelectric, and Cat-Dip were related businesses for the purpose of s. 4(1)(a) of the ESA, because of their common management, ownership, and financial control. In its second decision dated April 27, 2006, the Board found that the criteria set out in s. 4(1)(b) had not been met. According to the Board, there was neither an "intent" to defeat nor an "effect" of defeating the intent and purpose of the ESA

[20] In reaching this conclusion, the Board focused on the following: the circumstances surrounding the acquisition of Cat-Dip; how it related to the other companies owned by Mr. Lund; how Mr. Lund reacted to its financial problems; and, how, after its bankruptcy, Mr. Lund came into possession of the Cat-Dip assets, enabling him to establish the "phoenix company", Catelectric. The Board rejected the argument that s. 4 is "simply a deep pockets provision that requires only a finding of relatedness between a company that can meet its employment standards obligations and a company that cannot". It went on to observe that the fact that one related company is solvent and the other insolvent is not, on its own, an "effect" that defeats the intent or purpose of the ESA; there must be a connection between the "relatedness" and the insolvency. The Board concluded that there was no evidence in this case that the insolvency of Cat-Dip was caused or affected by its relationship with 406 and Novaquest. To the contrary, the Board concluded:

> Cat-Dip was propped up by the revenues and financial strength of Novaquest, which, in turn, allowed 406 to maintain the lending relationship with the Bank that supported Cat-Dip's mounting losses. Without Novaquest and 406, Cat-Dip would have failed earlier and without the ability to meet its employment standards obligations.

[21] Therefore, the Board held that Novaquest, 406, and Cat-Dip should not be treated as one employer under s. 4(2) of the ESA.

[22] Turning to Cat-Dip and Catelectric, the Board concluded that there was no evidence that any action taken in respect to Catelectric had an effect on the ESA entitlements of the Cat-Dip employees. It found that the rejection of the proposal in bankruptcy created the opportunity for Mr. Lund to acquire Cat-Dip's assets from BMO. The launch of Catelectric, a "phoenix" company, did not have any "effect" on Cat-Dip's ability to meet its ESA obligations to the terminated employees. Cat-Dip had gone bankrupt and the employees' entitlements to termination and severance pay were not going to be made in any event. Mr. Lund's choice to purchase the assets of Cat-Dip and use them to start Catelectric Inc. did not have an "effect" on Cat-Dip's abilities to pay the employees. The Board therefore held that Cat-Dip and Catelectric should not be treated as one employer under s. 4(2) of the ESA.

[23] The Board set aside the order of the employment standards officer.

Judicial review of the Board's decision by the Divisional Court

[24] The employees brought an application before the Divisional Court for judicial review of the Board's decision setting aside the decision of the employment standards officer. Swinton J., writing for the Divisional Court, concluded that "the decision of the Board was a reasonable one on the facts

before it". According to the Divisional Court, the Board neither misinterpreted the test under s. 4(1)(b) of the ESA nor made unreasonable findings of fact; it did not ignore relevant and material evidence, and there was an evidentiary basis for its decision. The Divisional Court therefore dismissed the application for judicial review.

[25] The appellants appeal to this court from the decision of the Divisional Court.

III. ISSUES

[26] The appellants raise the following four issues on appeal:

1. Under what circumstances should this court overturn a decision of the Divisional Court?
2. Did the Divisional Court err in failing to interpret s. 4 of the ESA before finding that the Board's application of the section was reasonable?
3. Did the Divisional Court fail to interpret correctly s. 4 of the ESA?
4. What other relevant factors should this court consider in deciding this case?

IV. POSITIONS OF THE PARTIES

The appellants' position

[27] It is worth reiterating that the appellants do not attack the Board's findings of fact. Instead, they advance a strictly legal argument. They accept that the Divisional Court could not have interfered with the Board's decision unless it found that decision to be unreasonable. They submit that this court should overturn the decision of the Divisional Court only if it determines that the Divisional Court applied the wrong law, misinterpreted the law, or was otherwise incorrect in its assessment and/or conclusion. The appellants advance a two-pronged argument in submitting that the Divisional Court erred in upholding the decision of the Board as reasonable.

[28] First, they assert that the Divisional Court failed to articulate the "correct" interpretation of s. 4 of the ESA before conducting its review of the Board's decision to determine whether it was reasonable. According to the appellants, the Divisional Court's approach is contrary to the very purpose of judicial review.

[29] Second, the appellants submit that, generally, in order for a decision to be reasonable, it must accord with the purpose and intent of the governing statute. According to the appellants, the Supreme Court of Canada has established specific principles to guide the interpretation of employment standards legislation; these principles require that the Board reach decisions that fulfill the underlying remedial purpose of the ESA, namely, to protect employees' entitlements.

[30] The appellants submit that the purpose of s. 4 of the ESA is to ensure that employees receive the severance and termination pay to which they are entitled even when their employer is unable to meet its obligations. While the appellants do not contest the Board's finding of fact there was no intent to defeat the ESA, they submit that the question of whether there was such an "effect" is a matter of legal construction. They submit that the Board failed to interpret the word "effect" in a

manner consistent with the clear and overarching legislative purpose of the ESA, generally, and s. 4, specifically. According to the appellants, the "effect" component of s. 4 is satisfied whenever the result or "effect" of not treating related employers as one employer is that employees lose their entitlements to severance and termination pay.

Position of the Director of Employment Standards

[31] The Director of Employment Standards (the "Director") asserts that there are two divergent and conflicting lines of decisions of the OLRB in relation to the interpretation of s. 4 of the ESA – a narrow line and a broad line. The Director submits that the narrow line of decisions, which it asserts the Board applied in this case, is unreasonable.

[32] The Director's argument that the "broad" line of authority is correct parallels the second prong of the appellants' argument. Like the appellants, the Director stresses that the ESA is remedial public welfare legislation designed to ensure minimum employment standards for a vulnerable class of non-unionized workers in Ontario. In particular, the "related employer" provisions of s. 4 are intended to expand who is liable as the "employer" for employees' entitlements to wages under the ESA without regard to corporate form. According to the Director, the narrow line of authority is unreasonable because it is wholly inconsistent with the approach to the interpretation of employment standards legislation mandated by the Supreme Court of Canada. The Director argues that the Board applied an unreasonable line of authority and made an unreasonable decision. A decision that applies an unreasonable line of authority cannot be reasonable.

Position of the OLRB

[33] The OLRB quite properly did not take a position on the merits of the appeal. It restricted itself to making submissions on the standard of review and related issues. The OLRB has a statutory duty under s. 116 of the ESA to hear and determine applications for review of decisions of employment standards officers. When reviewing the decisions of employment standards officers, the OLRB essentially conducts a hearing *de novo*. As set out in s. 119(6) of the ESA:

> The Board may, with necessary modifications, exercise the powers conferred on an employment standards officer under this Act and may substitute its findings for those of the officer who issued the order or refused to issue the order.

[34] Under section 119(7), the OLRB may amend, rescind, or affirm any order made, issue a new order, or affirm the refusal to make an order.

[35] Moreover, a decision of the OLRB is shielded from unrestrained judicial review by the privative clause in s. 119(13):

> A decision of the Board is final and binding upon the parties to the review and any other parties that the Board may specify.

The OLRB asserts that the protection of this privative clause strongly suggests that reasonableness is the appropriate standard for review of a decision of the OLRB. The OLRB places special emphasis on s. 119(14), which states:

> Nothing in subsection (13) prevents the court from reviewing the decision of the Board under this section, but a decision of the Board concerning the interpretation of this Act shall not be overturned unless the decision is unreasonable.

This subsection expressly precludes the review on a standard of correctness of a decision of the OLRB concerning the interpretation of the ESA.

[36] The OLRB submits that the Divisional Court quite properly declined to articulate a "correct" interpretation of s. 4 of the ESA prior to conducting its reasonableness review. On judicial review, the court's role is simply to determine whether the OLRB's interpretation was reasonable. If so, then the court should not interfere with its decision, even if other reasonable interpretations exist. The OLRB says that the Divisional Court was not required to resolve any conflict between two allegedly conflicting lines of decisions interpreting s. 4 of the ESA. According to the OLRB, "the existence of conflicting lines of cases is a natural and acceptable consequence of the deference that courts properly afford expert tribunals."

Position of the respondent companies

[37] The respondent companies submit that given the plain words of s. 119(14) of the ESA, a reviewing court cannot overturn a decision of the OLRB unless it is unreasonable. The respondent companies go so far as to argue that even if the Divisional Court regarded the Board's decision as wrong, it was obliged to uphold it if the decision was reasonable. They submit that a Board decision cannot be found to be unreasonable unless there is no line of analysis in its reasons that could reasonably lead the tribunal from the evidence to its conclusion. According to the respondent companies, the Board applied a clear and reasoned approach, consistent with prior jurisprudence of the OLRB and Divisional Court, and arrived at a reasonable conclusion.

[38] The respondent companies criticize the appellants' suggested approach to the interpretation of s. 4 as an attempt to impose a scheme of absolute liability on related employers. More importantly, they say that the appellants' liability approach to the related employer provision would deprive s. 4(1)(b) of all meaning and render it superfluous. By contrast, they submit that the Board's application of s. 4(1) was a reasoned balancing of interests that gave meaning to all the words of the provision.

V. ANALYSIS

1. *It was not the role of the Divisional Court to provide its own interpretation of s. 4*

[39] As summarized above, the appellants argue that the Divisional Court erred in concluding that the Board's interpretation and application of s. 4 of the ESA was reasonable without first determining the correct interpretation of the section.

[40] The premise of the appellants' argument is that judicial review on the standard of reasonableness allows the Board a margin of error. The Divisional Court's function on judicial review, as conceived by the appellants, is to measure the extent to which the Board's decision departs from the correct one. If the Board's departure from the correct decision is within a reasonable margin of error, the standard of review prevents the court from overturning it. According to the appellants, in this case, the Divisional Court was not in a position to measure the extent to which the Board's

decision deviated from the correct one because the court never considered first what the correct decision would be.

[41] The respondent companies' argument that a Board decision that is "wrong" might still be upheld is also premised on the view that judicial review on the standard of reasonableness allows the tribunal a margin of error to deviate from the correct decision.

[42] Regarding judicial review on a standard of reasonableness as the determination of whether a tribunal's decision deviates from the correct decision by more than a reasonable margin of error is a grave misconception. Judicial review on a standard of reasonableness recognizes there is no single outcome that must be regarded as the correct one. Rather, there is a range of outcomes that are acceptable and the function of judicial review on a standard of reasonableness is merely to determine whether the decision falls within that range. The Supreme Court of Canada has explained this repeatedly.

[43] In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, which was relied upon by the Divisional Court, the Supreme Court made clear at para. 50 that a reviewing court should not ask itself what the correct decision would be:

> At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, *when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been.* Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. *The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.* [Emphasis added.]

[44] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, which was rendered after the Divisional Court's decision in this case, the Court stated at para. 47:

> [C]ertain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[45] The court then summarized judicial deference in the context of the reasonableness standard, at para. 49:

> In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[46] In the present case, s. 119(14) of the ESA is a statutory instruction of the legislature to the courts to leave the primary responsibility for the interpretation of the ESA to the OLRB, a specialized expert tribunal. The legislature has mandated that the courts not overturn a decision of the OLRB concerning the interpretation of the ESA unless it is unreasonable.

[47] This legislative scheme, which stipulates judicial review on the standard of reasonableness, precluded the Divisional Court from determining what, in its view, would be the correct interpretation of s. 4 of the ESA in its review of the Board's decision. I therefore do not accept the appellants' argument that the Divisional Court erred in failing to articulate first what in its view would be the correct interpretation of s. 4 before conducting its reasonableness analysis.

2. *There are no conflicting lines of authority in the OLRB's jurisprudence*

[48] The Director's submission that a special approach to judicial review on the reasonableness standard is required where the administrative tribunal has developed two conflicting lines of authority concerning the interpretation of its governing statute is, at first blush, appealing. From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that they both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable. In such circumstances, the Director suggests, the reviewing court must consider both competing lines of authority and decide which one is reasonable. The Director's position, though perhaps unorthodox, is worthy of consideration.

[49] Before considering the Director's argument, however, it is worth commenting on the Director's posture before the court. Section 116(7) of the ESA gives the Director party status before the OLRB. The role the Director should play as a party was not an issue before the Board, the Divisional Court, or this court. The Director explained in its factum that it appears at proceedings of the OLRB and in court to ensure both that the ESA is interpreted in a manner that furthers its broad purpose and that it is consistently applied and enforced. In other words, the Director appears as an advocate of its view of the proper interpretation of the ESA.

[50] The Director submits that this case, as well as several other decisions of the OLRB and of employment standards Referees applying s. 4 of the ESA where the employer had become insolvent, were wrongly decided. They were wrongly decided, according to the Director, because they required evidence of some connection between the corporate relationship and the insolvency, and a finding that the employees' rights were defeated by something other than the insolvency. This, the Director submits, is an overly restrictive approach to the interpretation of the "effect" component of s. 4(1)(b) of the ESA. The Director cites cases dating back to 1990 in support of its submission.

[51] In my view, the Director cannot include cases dating back to 1990 in the analysis. Significant changes have been made in employment standards legislation and procedure since then.

First, the power to review orders of employment standards officers was transferred from Referees of the Office of Adjudication of the Employment Standards Branch to the OLRB by a legislative amendment in 1998. Second, the ESA was substantially rewritten in 2000. Specifically, s. 119(14) was added to the ESA as part of the 2000 amendments and the OLRB's mandate to interpret the ESA was established legislatively. Third, the related employer provision of the ESA was amended in 2000.

[52] I appreciate that the decisions of employment standards Referees, although not protected by a privative clause, were reviewed on the pre-*Dunsmuir* standard of reasonableness. I also note the Director's submission that s. 4 of the present ESA is intended simply to be a more readable and comprehensible restatement of s. 12 of the now repealed *Employment Standards Act*, R.S.O. 1990, c. E. 14 (although whether that is so is a question to be entertained by the body primarily responsible for the interpretation of the legislation). What I consider important is that only since the addition to the ESA of s. 119(14) can it be said that the legislature specifically assigned the primary role of interpreting the statute to the OLRB. The decisions of Referees interpreting earlier versions of the related employer provision in the predecessor statute simply cannot be used to support the contention that the OLRB has failed to interpret the current version of the statute in a consistent manner.

[53] A review of the OLRB's decisions regarding the interpretation of s. 4 of the current ESA does not support the Director's submission that there are two divergent and conflicting lines of authority. Some of the OLRB's decisions made a related employer liable for employee wages, and others did not. The result in each case, it seems to me, was primarily fact-driven. The different decisions can be understood by the presence of a particular fact or facts in one case and the absence of such a fact or facts in other cases.

[54] In only one or two cases has the OLRB taken an extremely broad approach to the interpretation of s. 4 by, in effect, treating it as a "deep pockets provision". For example, in *Re Timberland Ford Inc.*, [2004] O.E.S.A.D. No. 917 (August 6, 2004), at para. 35, in finding that the test for related employers under s. 4 had been met, Tanya Wacyk, Vice-Chair of the OLRB, based her decision on the reason that "[i]f the companies are treated as non-related entities, then [the employee] would be deprived of his statutory entitlement to severance as a long-term employee." This approach, however, is vulnerable to the justified criticism that it attaches liability from the simple fact of relatedness under s. 4(1)(a) and thereby fails to give any meaning to and renders superfluous s. 4(1)(b). The earlier decisions of employment standards Referees upon which the Director seeks to rely are vulnerable to the same criticism.

[55] Moreover, when assessed alongside the OLRB's other decisions concerning the interpretation of s. 4 since the current ESA came into force, it would appear that the decision in *Timberland* is an outlier.[2] Having regard to the fact-driven analysis in each case, I am not persuaded that the OLRB's decisions under the current ESA can be characterized as fitting into two competing incompatible lines of authority. Therefore, I find it unnecessary to consider what would be the proper approach to judicial review on a reasonableness standard in a situation where the administrative tribunal below has developed competing and inconsistent lines of decisions.

[56] It remains to consider the argument that the Board's decision was unreasonable considered on its own.

3. *The Board's decision in this case was not unreasonable*

[57] There can be no controversy as to the proper approach for assessing whether the standard of reasonableness has been met; it was explained clearly by the Supreme Court in *Dunsmuir*, as I have already noted above. It must be justifiable, transparent, and intelligible, and it must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[58] The appellants and the Director submit that the Board's interpretation of s. 4 in this case did not meet this standard because the Board adopted its interpretation of the ESA without regard to the principles established by the Supreme Court concerning the interpretation of employment standards legislation. They rely on the Supreme Court's statement in *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (S.C.C.), [1992] 1 S.C.R. 986, at p. 1003:

> The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination...The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers.
> ...
> Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not.

[59] They also cite the Supreme Court's pronouncement in *Rizzo v. Rizzo Shoes Ltd.*, 1998 CanLII 837 (S.C.C.), [1998] 1 S.C.R. 27, that any doubt or ambiguity in the text of employment standards legislation should be resolved in favour of employees; specifically, they point to the statement by Iacobucci J. at para. 36:

> [S]ince the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in the favour of the [employee] claimant.

[60] These overarching general principles, important as they may be, do not efface the basic canons of statutory interpretation. Nor do they dictate that every dispute concerning employment standards legislation automatically be resolved in favour of employees. The questions of what benefits are conferred by the statute and what are the minimum standards with which employers must comply still need to be determined. Specifically, in the present case, the text of s. 4(1)(b) must still be interpreted in the context of the statute as a whole. Doing so requires that some meaning be attached to all the words of s. 4(1)(b) – "if the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of the Act".

[61] Contrary to the submissions of both the appellant and the Director, it seems to me that in interpreting these words the Board did have due regard for the legislative purpose of creating statutory minimum entitlements for employees in the context of the statute as a whole. For example, at paragraph 48 of its decision dated April 27, 2006, in its consideration of the meaning of the word

"effect", the Board recognized that the ESA sets minimum standards, but considered them in context. The Board stated:

> ...[T]he Act sets minimum standards, but it does not provide any guarantees that the employees will receive them. Those minimum standards exist within a web of laws that grant priority over the assets in an unsuccessful business to secured creditors, in this case, the Bank. Those minimum standards exist within a legal framework that permits a struggling company to go bankrupt, and in the process, shed its liabilities. The legal framework that governs companies also permits struggling companies to make proposals in bankruptcy to creditors, with the possibility of providing creditors with some recovery of the debt owed.

Without doubt, the Board was referring to the fact that, although the ESA does set out minimum employee entitlements, it does not provide any special protection to termination and severance pay in the event of a company's bankruptcy. In order to understand the status of such payments in the context of bankruptcy, it is helpful to briefly review the "legal framework" to which the Board implicitly referred.

[62] I first note that severance and termination pay constitute "wages" under the ESA by virtue of the fact that they are both "any payment required to be made by an employer to an employee under this Act" pursuant to s. 1(1). Although s. 14(1) provides that "[d]espite any other Act, wages shall have priority over and be paid before the claims and rights of all other unsecured creditors of an employer, to the extent of $10,000 per employee", s. 14(2) states that this protection does not apply "with respect to a distribution made under the *Bankruptcy and Insolvency Act* (Canada) or other legislation enacted by the Parliament of Canada respecting bankruptcy or insolvency."

[63] Section 81(1) imposes joint and several liability on directors of the employer for employees' wages in several circumstances, including where the employer is insolvent and the employee has filed a claim for the unpaid wages with the receiver or trustee in bankruptcy. However, s. 81(3) specifically exempts directors from liability for termination and severance pay provided for by employment contracts or the ESA.

[64] After referring to the effect of these provisions, the Board commented:

> The existence of these legal mechanisms, and the fact that debts to employees for termination and severance pay have not been given priority over debts made to secured creditors means that the Act's minimum standards are not guaranteed to employees or even, to be realistic, likely to be paid to employees in the event of a company's demise. There are typically many people with better-protected interests ahead of the employees. Whatever one might think of the fairness of such a scheme, it is the one that exists.

It is clear to me that these comments address the argument of both the appellant and the Director. It confirms that although the ESA does prescribe minimum entitlements to employees, it does not guarantee that they will be paid in the event of the employer's bankruptcy.

[65] Against this general background, I turn to the Board's analysis of the undisputed evidence in this case. In its first decision dated October 26, 2005, the Board found that the requirements of s. 4(1)(a) were met – all of the respondent companies were related businesses. The issue was therefore

whether their relatedness had the intent or effect of directly or indirectly defeating the intent and purpose of the ESA under s. 4(1)(b).

[66] In approaching this question in its second decision dated April 27, 2006, the Board first noted that "it is a different and separate question" than simply whether the respondent companies were related:

> If the Legislature had intended to impose liability whenever entities were found to have been engaged in related or associated activities, it would have said so. There would be no need then for section 4(1)(b). Consequently, I reject the argument that section 4 is a simple deep pockets provision that requires only a finding of relatedness between a company that can meet its employment standards obligations and a company that cannot…All of the Board's decisions to date interpreting section 4 have concluded that after relatedness has been found, it is necessary to make a separate inquiry about the intent or effect of that relatedness.

[67] The Board also cited the decision of the Divisional Court in *Carillon Decorative Products Inc.* reflex, (2004), 71 O.R. (3d) 500 (June 9, 2004), which set aside as unreasonable a decision of an employment standards officer which determined that two entities were liable for employees' wages because they were related, without considering the intent or effect of that relatedness.

[68] The Board then made a crucial finding of fact which, as I have emphasized, is not attacked on appeal:

> Cat-Dip was propped up by the revenues and financial strength of Novaquest, which, in turn, allowed 406 to maintain the lending relationship with the Bank that supported Cat-Dip's mounting losses. Without Novaquest and 406, Cat-Dip would have failed earlier and without the ability to meet its employment standards obligations.

[69] As the Divisional Court put it:

> The evidence is clear that Cat-Dip was insolvent at least by September 2003. BMO was unwilling to advance further funds, although family members of Mr. Lund advanced funds to keep Cat-Dip going. The evidence shows that Cat-Dip's relationship with the other corporations resulted in a gain to it.

[70] The finding of fact that Cat-Dip's relatedness to Novaquest and to 406 supported the company, rather than consuming assets that might otherwise been available to meet Cat-Dip's employment standards obligations, is a justifiable and intelligible basis supporting the Board's conclusion that the relatedness did not have the effect of defeating the intent and purpose of the ESA. The reasoning of the Board is transparent. As I have already stressed, the intent and purpose of the ESA does not guarantee that employees will be paid their severance and termination pay entitlements in the event of the employer's bankruptcy.

[71] The Board then went on to consider the relationship between Cat-Dip and Catelectric. Again, it found that there was no evidence that any action taken in respect of Catelectric "had the effect, either indirectly or directly, on the entitlements of the employees of Cat-Dip." According to the Board, there was "not a shred of evidence" of any collusion or inappropriate activity in the making of Cat-Dip's proposal in bankruptcy to the unsecured creditors. It was the rejection of that proposal that created the opportunity for Mr. Lund to acquire the assets of Cat-Dip from BMO and to

create Catelectric. There was simply no basis on which to conclude that any action taken by Catelectric affected the likelihood that the employees of Cat-Dip would receive their severance and termination pay; those payments were not going to be made by Cat-Dip in any event because the company was in dire financial straits. This finding provides a justifiable, intelligible, and transparent basis for Board's conclusion that Catelectric and Cat-Dip were not related employers within the meaning of the ESA.

[72] Finally, intent to defeat the ESA was not an issue on this appeal. The Board found as a fact that Cat-Dip's relatedness to the other companies did not have an effect on its capacity to pay the appellants' termination and severance pay. This finding places its conclusion in law that the relatedness did not have the effect of defeating the intent and purpose of the ESA among the range of acceptable outcomes.

[73] The Divisional Court did not err in upholding the Board's decision.

VI. DISPOSITION

[74] For the foregoing reasons, I would dismiss the appeal. The parties may make submissions on costs through the court's senior legal officer, Mr. John Kromkamp on a schedule directed by him.

3798-05-R; 3959-05-U (Court File No. 382/08) Construction Workers Local 52, Affiliated with the **Christian Labour Association of Canada** –and- Pre-Eng Contracting Ltd.; Constaff Construction Ltd.; Labourers' International Union of North America, Local 506; Carpenters' Union, Central Ontario Regional Council; United Brotherhood of Carpenters and Joiners of America and OLRB

Certification – Charter of Rights and Freedoms – Construction Industry – Employer Support – Judicial Review – Unfair Labour Practice – The organizing campaigns of the Labourers, Carpenters and CLAC overlapped, and although CLAC's campaign began last, it filed its application first – At one of four sites there was a hostile rejection and restriction of the Labourers' representatives, in contrast to unhindered meetings in the trailer for the CLAC representative – At two other sites, the Board found that the site superintendents assisted the CLAC representative by coordinating the employees' availability after work – The employer is bound by the actions of its agent, the site superintendents – The Board found the support by the superintendents to be in violation of s. 15 as it undermined the necessary arms-length relationship between a bargaining agent and an employer, and it meant that the Board could not rely on the membership evidence – Application dismissed – On judicial review the court found that the Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted a refusal to certify under s. 15 – The court found the Board's decision to be within a range of acceptable and rational solutions – Additionally, since the Charter issued was not raised before the Board it ought not to have been raised on judicial review – Application and constitutional challenge dismissed

Superior Court of Justice (Divisional Court), J.M. Wilson, Low, Ray, JJ., June 23, 2009

REASONS FOR DECISION

[1] This is an Application for Judicial Review of two decisions of the Ontario Labour Relations Board (OLRB), dated April 8, 2008 and May 12, 2008, dismissing the Applicant's certification application on the ground that it had received employer support. The refusal to certify was pursuant to section 15 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, *(LRA).*

> 15. The Board shall not certify a trade union if any employer or any employers' organization has particpated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights end Freedoms. 1995,* c. 1, Sched. A, s. 15.

[2] On January 19, 2009, Wilson J. granted Paul Graham leave to intervene for the purpose of raising and arguing a *Charter* claim.

[3] It was the Applicant's position that the Board made unsupported findings of fact, and drew inferences that could not rationally be drawn from the evidence before it in concluding that it had received employer support. Further, it was the Applicant's position that it erred in failing to apply s. 70 of the *LRA,* which protected the employer's right to show its preference for the applicant. The Intervenor, Paul Graham argued that the Board's decision offended the Applicants right to freedom of association contained in s. 2(d) of the *Charter.* This position was supported by the Applicant.

[4] The Respondent unions contended that the Board's decision was reasonable as to its findings of fact and its consideration of s. 15 of the *LRA.* Further, it took the position that s. 70 of the *LRA* was irrelevant to the certification issue, as it dealt only with the employer's conduct, not the applicant's certification.

[5] The Respondent OLRB addressed only the standard of review.

[6] The fact finding process, the determination of the legal issues arising under the *Labour Relations Act,* and the decisions of the OLRB are to be accorded great deference. (see *Maystar General Contractors Inc. v. I.U.P.A. T., Local 1819,* (2008) 90 O.R. (3d) 451) (April 11, 2008). The standard of review is reasonableness. In judicial review, reasonableness "is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". *(Dunsmuir v. New Brunswick,* (2008] 1 S.C.R. 190 at para. 47)

[7] The Applicant and the two Respondent building trades associations were each seeking certification as the bargaining agent for the employees of the Respondents PreEng and Constaff. The Applicant's application for certification was supported by 55% of the employee membership cards. Both Respondent building trades complained that the Applicant had received employer support thus warranting a denial of certification under s. 15 of the *LRA.* The Applicant never raised the constitutional issue before the Board.

[8] The Board heard evidence between June 1, 2006 and February 8, 2008. It released its decision April 8, 2008, and dismissed a request for reconsideration with reasons on May 12, 2008.

[9] The chief organizer for the Applicant, Paul Graham, was an employee of PreEng/Constaff who was permitted to take paid vacation in order to devote his time to his organizing efforts. The Board took no issue with Mr Graham's efforts, and specifically found no support for Mr. Graham by Pre-Eng/Constaff.

[10] The contentious issue was respect to allegations of support by site superintendents for on-site meetings at the various work sites, and their overt support for the Applicant. This is in sharp contrast to their conduct toward the Respondent building trades, which were ordered off the premises.

[11] Issue was taken by the Applicant with the Board's characterization of these site superintendents as agents of the employer. It was argued that this was an erroneous legal conclusion. We are satisfied that no significance was intended beyond characterizing the site supervisors as management. They were clearly management.

[12] The Applicant also took issue with several inferences the Board drew. The Board explicitly stated that many of the findings in and of themselves would not have attracted its concern. Rather, it was the combination of all of the evidence that gave rise to its concerns. We are satisfied that while some findings of fact considered in isolation might be troubling, that the findings of fact overall were reasonable, and could reasonably support the conclusion that the employer had given support to the Applicant.

> Once it has been determined that curial deference to a particular decision of a tribunal is appropriate, the tribunal has the right to be wrong, regardless of how many reviewing judges disagree with its decision. *(United Brotherhood of Carpenter and Joiners of America, Local 579 v. 5radco Construction Ltd.* (1993] s,c.J. No. 56, [1993] 2 S.C.R. 316, @ paragraph 40 per Sopinka, J)

[13] Section 70 of the *Labour Relations Act* provides:

> 70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence. [emphasis added]

14] The Applicant contended that not only did the Board fail to address a. 70 of the *LRA,* but that its findings flew in the face of the protected right of an employer to demonstrate its preference for a particular union. Since the Board made no reference to this argument or to s. 70, it is not clear whether this argument was actually before the Board.

[15] The Board's jurisprudence shows a wide range of employer conduct that may justify a refusal to certify under s. 15 of the *LRA.* In its decisions, the Board has considered the effect of s. 70 of the *LRA* and its interplay with s. 15. However the Board's own jurisprudence has, for decades, adopted a purposive approach rather than a literal one in construing section 15.. (see *Ontario Hydro,* [1989] O.L.R.B. Rep. February 185, paras. 72-75 and *Covertite Eastern lid,* (1996] O.L.R.B. Rep. May/June 386 at para, 56).

[16] There are no court decisions that depart from the purposive approach. The overarching principle is that while the employer is entitled to express its preference, employer support must not undermine the necessary arm's length relationship between the employer and the trade union and thereby intrude on the employees' free choice of a trade union. There is a significant distinction, therefore, between tacit tolerance of the trade union as opposed to overt, direct, and active support. A demonstrable interference with the free choice of the employee to vote for the trade union of his choice would trigger a refusal to certify under s. 15 — and consequentially also a finding of an offence under s. 70— of the *LRA* (see *Covertite Eastern Ltd.* and *Coca-Cola Bottling Co.*, [2004] O.L.R.B. Rep. January/February 23) (January 29, 2004).

[17] The Board applied principles consistent with its prior jurisprudence in concluding that the totality of the conduct by members of management was of a nature and extent that it could reasonably be characterized as support for the Applicant and thus warranted the refusal to certify under s. 15 of the *LRA*.

[18] We are satisfied that the Board's decision is within the range of acceptable and rationale solutions. On the facts of this case, it was not necessary that the Board conclude that there was also a violation of s. 70.

[19] The Charter issue was never raised before the Board, and it ought not to have been raised here for the first time on judicial review. As for the argument on its merits that the Board's decision contravened the protected *Charter* right of freedom of association, we are satisfied that it did not. The purpose of s. 15 of the *LRA* is to provide protection for the right of freedom of association by preserving the integrity of the certification process of a trade union.

[20] The application and the constitutional challenge is dismissed.

[21] We heard submissions on costs at the conclusion of the argument. Counsel agreed that if the application was dismissed, that the Applicant would pay costs in the amount of $5,000 to each of the trade unions. Further, the Intervenor, Graham agreed that he would pay costs in the amount of $1,500 to each of the trade unions if he was unsuccessful on the constitutional issue. The Respondent Labourers and Carpenters will therefore each be entitled to their costs in the amount of $5,000 and $1,500 for a total of $6,500 each payable by the Applicant. The OLRB is not seeking its costs.

2504-08-R (Court File No. 122/09) Labourers' International Union of North America, Ontario Provincial District Council -and- **Graham Bros. Construction Ltd.**; International Union of Operating Engineers, Local 793 and OLRB

Bargaining Unit – Certification – Judicial Review – Application by the LIUNA, OPDC (supported by the IUOE) for judicial review of an interim decision by the Board relating to certifications sought for workers of Graham Bros. Construction Ltd. – In its response to both applications for certification, Graham identified 24 individuals on each of its employee lists – The unions determined that 11 of those individuals were properly on the LIUNA list and 13 were properly on the IUOE list – The IUOE then withdrew its application for certification – The unions argued that because Graham was not permitted by s. 128.1(3) of the Act to file a qualified list, they were entitled to take Graham's list as an unqualified position and reach

agreement between themselves on the distribution of the 24 employees – Accordingly, when the applicants agreed 13 names belonged on the IUOE list, Graham was a party to that agreement – The Board found that Graham was not a party to the agreement and that in any event the agreement became irrelevant when the application was withdrawn – The Board directed Graham to provide an unqualified list and allowed LIUNA to respond – LIUNA sought judicial review of the Board's decision – The Court held that the Board did not rule on Graham's ability to provide an unqualified list; the finding that Graham was not a party to the agreement between the unions was reasonable – Application dismissed

Superior Court of Justice (Divisional Court), J. Wilson, Lederman, Karakatsanis JJ., May 20, 2009

ENDORSEMENT

[1] The applicant Labourers' International Union of North America, Ontario Provincial District Council (LIUNA), with the support of International Union of Operating Engineers, Local 793 (IUOE), seeks judicial review of an interim decision of the Ontario Labour Relations Board (OLRB or Board) relating to certifications sought for workers at the respondent Graham Bros. Construction Ltd. (Graham).

[2] There is no dispute that the standard of review that applies is reasonableness and the Board is entitled to considerable deference in interpreting its statute and making its findings.

[3] Section 128.1 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A (LRA) governs a process for card-based certification of a trade union in the construction industry. The Legislature has set out an expeditious, highly prescriptive certification provisions to closely manage the certification process. The OLRB has considerable expertise and the legislation includes two privative clauses.

[4] Subsection 128.1(1) requires that the trade union give written notice to the Board and to the employer on the date the trade union delivers a copy of the application to the employer.

[5] Subsection 128.1(3) then requires the employer, upon receipt of notice of an application for certification, to provide the Board with the names of the employees to be included in the bargaining unit within two days.

[6] Further to s. 128.1(4), the Board shall determine based upon the information provided in the application and from the employer under subsection (3), the bargaining unit and the percentage of employees in the bargaining unit who are members of the trade union. Finally, the Board may hold a hearing if it considers it necessary in order to make a decision under this section.

[7] Both unions were seeking to certify workers at Graham: LIUNA over labourers, and IUOE over operating engineers. They each applied to the OLRB for a certificate pursuant to s. 128.1 of the LRA and intervened in each other's applications.

[8] Graham prepared a list of workers that fell into each prospective bargaining unit, but there were 24 workers who appeared on both lists. Graham took the position that given the large numbers of employees, the nature of the work and the number of job sites, it could not make a final determination with respect to those employees in the time permitted and they were cautious in light of the Board's jurisprudence that an employer could not add names to the list. The Board made no finding of bad faith or adverse comment about Graham's placing the same names on both lists.

[9] The two unions agreed that 13 of the 24 overlapping workers should be on the IUOE list, and the remaining 11 should be on the LIUNA list.

[10] IUOE subsequently withdrew its application, as it could not meet the 55% requirement for certification. LIUNA was in a position to seek automatic certification with the exclusion of the 13 workers on its list.

[11] The unions submit that it is not permissible under the legislation for the employer to file qualified lists. They argue, therefore, that they were entitled to treat the lists of names prepared by Graham as firm and unqualified. Accordingly, when they agreed to accept Graham's representation that 13 people worked in the IUOE bargaining unit, they submit that Graham was a party to that agreement. They submit that because the OLRB does not permit a worker to be in 2 bargaining units on a given certification application filing date, and because parties are not permitted to resile from an agreement, Graham was bound by the agreement worked out between the 2 unions. Accordingly, the unions take the position that the employer was a party to the agreement that 13 workers would be removed from the LIUNA list provided by the employer under s.128.1(3). Graham disagreed and the matter went to the Board as a preliminary matter.

[12] The Board ruled at para. 32 that Graham had not been a party to the agreement between the two unions that 13 names should be on the IUOE Schedule and in any event the agreement became irrelevant when that application was withdrawn. The Board further concluded that Graham was not a party to an agreement that the 13 names should therefore be removed from the LIUNA Schedule A.

[13] The Board found at para. 33 that the unions were aware that there were overlapping names and that they knew that there was a qualified placement of 24 names on the lists. The Board noted that if Graham had made representations that those employees were in the IUOE bargaining unit, it had equally made the same representations that those employees were in the LIUNA bargaining unit. At para. 35, the Board found that "Given the absence of a firm position taken by Graham in respect of the names in issue, the IUOE and LIUNA could not, by stating their own position, create an agreement with Graham."

[14] The Board further stated (at para. 35) that even if an agreement existed that the 13 names were on the IUOE list, the Board would not have found such agreement required that the 13 names be removed from the LIUNA list. Given that the other application had been withdrawn, those workers could not be in two bargaining units.

[15] The Board concluded (at para. 44) that the employer was required to provide an unqualified Schedule A, and that the Union was entitled to respond. If there is disagreement with respect to membership, the issue then proceeds through the Board's status dispute process.

[16] The Board concluded that the employer had not been party to the unions' agreement with respect to membership of the 24 workers that appeared on both Schedules. The Board found that the existence of overlapping names did not permit the unions to decide between them where to allocate those workers.

[17] We do not agree with the applicants' submissions that the Board's decision was contrary to its jurisprudence and was unreasonable. The OLRB did not decide that s.128.1(3) permits the

employer to provide a qualified Schedule A. The Board ordered the employer to provide an unqualified Schedule A, in compliance with the legislation before the Union was required to take a position. Rather, the Board found that the employer had not been party to the unions' agreement. The Board found that the existence of overlapping names was not an agreement to permit the unions to choose between them where to allocate those workers. A union is simply not permitted to choose to disregard names on the employer's list absent agreement between them. If there was a dispute about the whether the workers were properly included in the bargaining unit for certification purposes, and no agreement is reached between the parties, the Board must determine the issues.

[18] The application is therefore dismissed. The Board does not seek costs. The parties agreed that $5,000 was an appropriate quantum. Graham shall have its costs fixed in the amount of $5,000.

3122-04-G (Court File No. 177/09) Greater Essex County District School Board –and- United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 and the OLRB

Construction Industry Grievance – Judicial Review – Non-construction Employer – Timeliness – In a preliminary decision the Board ruled that the grievance was timely; although the grievance was referred late to arbitration under the collective agreement the Board did have the discretion to extend the time for the referral; and it was appropriate to accept the referral to arbitration – Greater Essex sought judicial review of the Board's interim decision and the union brought a motion to quash the application as premature – The court found no exceptional circumstances that would persuade it to hear the application – The court stated that the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point – Motion granted – Application for judicial review quashed

Superior Court of Justice (*Divisional Court*), *Carnwath, J.*, June 5, 2009

REASONS

Motion to quash the application for judicial review granted.

1. I adopt the reasons of Swinton J. in *Greater Essex & OSSTF* [2005] O.J. No. 6401 at para. 14 as an accurate statement of the law vis-à-vis the approach to be taken to interim motions for judicial review.

2. Absent special circumstances such motions should be discouraged unless they must be heard.

3. I find nothing in the facts of this case that would persuade me to find exceptional circumstances. It is true there appears to be a discrete issue to be considered and that the material is in place to argue the issue. If ultimately successful, the Board will have undergone a grievance hearing to no purpose.

4. Nevertheless, the requirement that labour disputes be resolved expeditiously trumps any perceived advantage in interrupting the proceedings at this point.

5. In the exercise of my discretion, I see no need to refer this to a full panel.

0059-06-ES; 0061-06-ES (Court File No. 1719) Lorraine Fraser Viscount Residence and Kuipers Residential Home –and- Shirley Coyea, Dana Grant, Director of Employment Standards and OLRB

Employment Standards – Judicial Review – The Board had upheld an ESO's finding that employees of the applicants' group homes were not covered by an exemption for "residential care workers" and therefore were entitled to overtime pay – On judicial review, the Court found that while the Board recognized the purposes of the ESA, it failed to address the purpose of the exemption, namely to facilitate the operation of the group homes, and failed to balance the purpose of the exemption against the purposes of the Act – The Court found it was unnecessary to address the Board's "consideration of whether the residents in questions were 'developmentally handicapped persons' within the meaning of the regulation," as the Court found the Board's decision was not reasonable due to its failure to address the purpose of the exemption – Application allowed; the Court did not remit the matter back to the Board, but substituted its own decision

Superior Court of Justice (Divisional Court), Valin, J.M. Wilson, Ray. JJ., May 25, 2009

THE COURT:

Background

[1] This is an application for judicial review of the decision of Vice-Chair Waddingham, Ontario Labour Relations Board, dated April 11, 2008, by the applicant group homes. The Board upheld the decision of an Employment Standards officer that an exemption under the *Employment Standards Act, 2000,* SO. 2000, c. 41 [ESA] was not available to the applicants.

[2] The exemption in question applies to residential care workers dealing with developmentally handicapped persons, and their hours of work, overtime and holiday pay, and guaranteed eating period requirements (0. Reg. 285/01).

[3] It was the applicants position before the Board that the residents of the group homes had been diagnosed with schizophrenia, were developmentally handicapped persons, and lived in small residential facilities with a fixed provincial per diem.

[4] The applicants called expert evidence, accepted by the Board, that schizophrenia in 80 percent of cases is evidenced by a genetic predisposition, and that the average age of diagnosis is 21 for males, and 24 for females.

[5) The position taken by the Director of Employment Standards was that the Ministry's Ontario, Ministry of Labour, *Employment Standards Policy Interpretation Manual* (Carswell)

reflected a previous decision of the Board *(Pacaldo v. Dolega-Kamienski Estate,* [2003] O.L.R.B. Rep. 45 (January 24, 2003)):

> "...Consistent with the Board's decision in *Re Pacaldo and DolegaKamienski* "developmentally handicapped persons" are considered by the Program to be those persons with a condition or handicap that is present or occurs before the age of 18 years..."

[6] The applicants' position was that the imposition of the "18 years" condition in the policy was an arbitrary limit on an individual's formative years.

[7] The Board rejected the applicants' contention and accepted that "18 years as the limit for an individual's formative years is appropriate".

[8] Since there was no evidence before the Board that the residents of the group homes were diagnosed with schizophrenia before age 18, it concluded that the residential care workers were not exempt from the *ESA.*

Standard of Review

[9] All parties including the Board are of the view that the standard of review is reasonableness *(New Brunswick (Board of Management) v. Dunsmuir,* [2008] 1 S.C.R. 190).

[10] In particular, the court in *Dunsmuir, supra,* noted as follows at para. 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes.

Position of the Parties

[11] The position of the group homes is that th~ Board failed to meet the reasonableness standard both within the decision-making process and with the outcomes arising from its decision.

[12] The position of the respondents is that the Board was reasonable in all respects, and that the Board had no evidence before it s to the diagnostic criteria of the residents of the homes, so that it quite properly dismissed the application before it.

Analysis

[13] Two key principles to consider in interpreting provisions of the *ESA* were outlined at 3-4 of *Re Blais,* [1995] O.E.S.A.D. No. 31 (Ont. Lab. Ct.) (April 19, 1995), as follows:

> a) employment standards legislation is remedial, provides minimum protection for employees, and therefore exclusions should be construed narrowly; and
>
> b) consideration should be given to the purpose of the exclusion or exemption in determining the appropriateness of its application to the particular circumstances

[14] In this case, the Board, in purporting to balance these relevant principles, held at para. 55:

> While I am not unsympathetic to the financial pressures which the applicants find themselves in because of the Ministry of Health funding model in which they are forced to operate, the purpose of the ESA and its exemptions is not to facilitate the operation of residential homes for schizophrenics; rather, it is to protect the entitlement of workers to basic working conditions.

[15] While the Board addressed the purpose of the *ESA,* it failed to address the purpose of the exemptions, which is set out in s.20 of O.Reg.285/01 as special rules regarding residential care workers. The effect of the special rules is to allow an employer of residential care workers to schedule residential care workers for longer periods of time without incurring overtime costs which would otherwise be payable under the *ESA's* minimum standards of general application.

[16] The group homes provide 24-hour care for residents, who are otherwise unable to maintain their own residence. The only source of funding is through the Ministry of Health. The group homes cannot charge the residents a fee. The Ministry's guidelines provide a ratio of one employee for every seven residents. The employees live at the group home, are on duty 24 hours per day, and work shifts that range from three to five days at a time.

[17] A "residential care worker" is defined as a "person who is employed to supervise and care for.., developmentally handicapped persons in a family-type residential dwelling or cottage and who resides in the dwelling or cottage during work periods..." (O.Reg.285/O1, s.1 .).

[18] We conclude that the Board was correct in identifying the purpose of the *ESA,* but that it failed to consider that the exemption under the *ESA* for "care workers" is to facilitate the operation of the homes, while at the same time protecting workers.

[19] We have some concerns about the relevance of the Board's consideration of *Pacaldo, supra,* which addressed an entirely different situation, and also some concerns about the imposition of the "18 year old" test. However b~) reason of our finding that the Board's decision was not reasonable, due to its failure t[1] address the purpose of the exemption, we do not consider it necessary to address its consideration of whether the residents in question were "developmentally handicapped persons" within the meaning of the regulation (O.Reg. 285/01).

Conclusion

[20] The application for judicial review is therefore 'allowed. The decision of the Board is quashed. On the facts of this case, we conclude the applicants are entitled to the benefit of the exemption.

[21] The applicants are the successful party. Although counsel was conducting the matter on a pro bono basis, we are satisfied that an award of costs is appropriate *(1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (October 25, 2006) at para 34 (C.A.)). Costs are fixed at $6,000 payable by the respondent, the Director of Employment Standards, to the applicants.

1096-08-R (Court File No. 532/08) The MacKenzie Construction Group Inc. –and- International Union of Painters and Allied Trades, Local Union 1891 and Ontario Labour Relations Board

Certification – Construction Industry – Judicial Review – Natural Justice – Reconsideration – The employer did not respond to the union's application for certification and the Board certified the union pursuant to s. 128.1 – Two weeks later the employer applied for reconsideration, without filing a response and without explaining its lack of response to the application, simply stating that it was "the general contractor and all work is subcontracted for all jobs" – The Board denied the reconsideration request – The court found the Board's decision was reasonable and was not a denial of natural justice – Application dismissed

Superior Court of Justice (Divisional Court), Swinton, Low and Bryant JJ., June 15, 2009

SWINTON J.: (Orally)

[1] The applicant, the Mackenzie Construction Group Inc. ("Mackenzie"), applies or judicial review of the Reconsideration Decision of the Ontario Labour Relations Board ("the Board") dated July 25, 2008.

[2] In its July 14, 2008 decision, the Board granted the application of the respondent, the International Union of Painters and Allied Trades, Local Union 1891 ("the Union"), certifying the Union as the bargaining agent of painters, apprentices and drywallers in the employ of Mackenzie for certain geographical regions in Eastern Ontario.

[3] Mackenzie requested a reconsideration of the July 14 order, which reconsideration was denied by the decision of the Board dated July 25, 2008. In the Request for Reconsideration, Mackenzie said the following in support of its request:

> The Mackenzie Construction Group is the general contractor and all work is sub contracted for all jobs.

[4] The Board's Form A-49 directs a requesting party to read Information Bulletin No. 19 before completing the form. Both the form and the Information Bulletin make it clear that the requesting party must include complete representations in support of its request.

[5] Subsection 114(1) of the *Ontario Labour Relations Act*, S.O. 1995, c.1, Sch. A provides that the Board may, at any time, if it considers it advisable to do so, reconsider any decision. The applicant argues that it was denied procedural fairness because the Board failed to request that Mackenzie provide further evidence in support of its position before denying the Request for Reconsideration.

[6] The Board's approach to a request for reconsideration is set out in Information Bulletin No. 19. It provides under the title "General Guidelines":

> Generally, the Board will not reconsider its decision unless the requesting party has new evidence that would be practically conclusive of the case and *that it could not have reasonably obtained earlier*, or the party has *new* objections or arguments *that*

> *it had no opportunity to raise earlier.* Because of the need for finality in labour relations matters, the Board does not treat its reconsideration power as either a tool for a party to repair the deficiency of its case nor as an opportunity to reargue it. (See *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096). If the requesting party relies on matters that could reasonably have been raised at the original hearing, the Board will normally not reconsider its decision.

[7] The following are our conclusions. First, the affidavit evidence is inadmissible except for paragraphs 12, 13 and 14 of Mr. Mackenzie's affidavit, which go to the issue of procedural fairness.

[8] Second, in our view, there was no denial of procedural fairness. The Board fully considered Mackenzie's reconsideration request. As the Board observed, no reason was offered by Mackenzie for its failure to file a response to the application for certification in a timely way. As well, Mackenzie provided no evidentiary support for the statement that it had no employees of its own.

[9] Mackenzie had an opportunity and an obligation to establish some factual basis for the Board to reconsider its original decision. Mackenzie did not provide a reason for its failure to respond to the initial certification application, nor did it set out any factual issue that it wished the Board to consider in support of its assertion that it had no employees. The Board found that there was some prejudice to the Union.

[10] In our view, the decision, based on the material before the Board, was reasonable, and there was no denial of procedural fairness.

[11] Therefore, the application for judicial review is dismissed.

COSTS

[12] I have endorsed the Application Record, "This application is dismissed for oral reasons delivered by Swinton J. on behalf of the Court. Costs to the Union fixed at $4,000.00, all inclusive, payable by the applicant."

3331-03-R (Court File No. 127/09) Central Ontario Regional Council of Carpenter, Drywall and Allied Workers v. **Rochon Building Corporation** and Ontario Labour Relations Board

Certification – Construction Industry – Judicial Review – The Board had found that three site superintendents were members of a bargaining unit, as they were not performing "managerial functions" pursuant to s. 1(3)(b) of the Act – The court found the Board considered the evidence before it; its past jurisprudence on the issue; and it clearly understood the reason for the exclusion was to prevent conflict of interest – Further the Board weighed the evidence and concluded the individuals were working foremen without significant influence over other individuals – The Board's reasons were clear and the conclusions fell within a range of reasonable outcomes, given the evidence – Application dismissed

Superior Court of Justice (Divisional Court), Swinton, Low, Bryant J.J.., June 12, 2009

DISPOSITION – THIS APPLICATION IS dismissed.

This is an application for judicial review of a decision of the Ontario Labour Relations Board dated November 26, 2008 determining that three individuals were members of a bargaining unit, because they were not performing "managerial functions" within s.1(3)(b) of the *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A.

The question before the Board was one of mixed law and fact, requiring the application of the Board's specialized expertise in construction industry labour relations. The standard of review of the decision is reasonableness.

The Board considered the evidence before it and its past jurisprudence on "managerial functions". The Board clearly understood the reason for exclusion of those exercising managerial functions was to prevent conflict of interest (see reasons, para. 43). The Board weighed the evidence and concluded that the individuals were working foremen, who did not have the power to hire, fire or otherwise influence decisions of importance to other trades people. Nor did they have independent decision-making power about significant aspects of Rochon's business. Therefore, they were not excluded from the bargaining unit.

The Board's reasons were clear and the conclusion fell within a range of reasonable outcomes, given the evidence. It is not the function of this Court on judicial review to reweigh the evidence.

For these reasons, the application for judicial review is dismissed. Costs to the respondent Rochon payable by the applicant in the amount of $4,500.00 all inclusive.

0210-08-R (Court File No. 537/08) Schuit Plastering & Stucco Inc. and/or Gerald Schuit Plastering & Stucco Inc. –and- Universal Workers Union, Labourers' International Union of North America Local 183

Certification – Employer – Judicial Review – Schuit applied for judicial review of two decisions by the Board certifying LIUNA after the employer had failed to respond to the application – In the reconsideration before the Board, Schuit claimed that it did not respond to the application because it was not the employer of the three employees; it had assumed the application was sent to it in error; and it did not appreciate the nature and effect of the application – The Board denied the applicant's request for reconsideration and upheld the original certification – On judicial review, the Court held that the Board was entitled to considerable deference particularly with respect to the exercise of its discretion in the certification process – After considering the employer's reasons for failing to respond to the application, it was reasonable for the Board to exercise its discretion to refuse to reconsider its decision – Application dismissed

Superior Court of Justice (Divisional Court), Lederman, Karakatsanis and Tulloch JJ., May 15, 2009

REASONS FOR JUDGMENT

KARAKATSANIS J.:

Overview

[1] This is an application for judicial review under ss. 2 and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 of two decisions by the Ontario Labour Relations Board (OLRB or the Board) dated April 29, 2008 and May 28, 2008, in which the Board certified the applicant Schuit Plastering & Stucco Inc. (Schuit) as the employer of the members of the respondent Union and dismissed Schuit's request for reconsideration.

[2] The applicant seeks an order quashing both decisions and an order requiring the OLRB to hear evidence on the question of whether Schuit is the proper employer to be certified in this case.

Background

[3] On April 16, 2008 the Union applied to the OLRB for a certificate pursuant to s. 128.1 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sch. A (LRA), naming Schuit as the responding party in the application. On the date of the application three workers were employed on the building site.

[4] Section 128.1 of the LRA governs a process for card-based certification of a trade union in the construction industry. The Legislature has set out an expeditious, highly prescriptive certification provisions to closely manage the certification process.

[5] Section 128.1(1) requires that the trade union give written notice to the Board and to the employer on the date the trade union delivers a copy of the application to the employer. Section 128.1(3) requires the employer, upon receipt of notice of an application for certification, to provide the Board with the names of the employees to be included in the bargaining unit within two days. Further to s. 128.1(4), the Board shall determine the bargaining unit and the percentage of employees in the bargaining unit who are members of the trade union, based upon the information provided in the application and from the employer pursuant to s.128.1 (3). The Board may hold a hearing if it considers it necessary in order to make a decision under this section or may require a vote (s.128.1(6)).

[6] Rule 2.3 of the Ontario Labour Relations Board Rules of Procedure provides that if a party receiving notice of an application does not file a response as required by the Rules, he or she may be deemed to have accepted all of the facts stated in the application, and the OLRB may decide the case upon the material before it without further notice. In addition, the notice to the employer in the certification application form provides that failure to respond is deemed to be acceptance of the information in the application.

[7] The Board also takes the position that it may allow late filing of a response at its discretion. Rule 25.5 deals specifically with the procedural requirements of applications for certification in the construction industry and provides that a "responding party" in receipt of an application pursuant to s. 128.1 must file a response with the Board within two days. Rule 1.5(n) defines a "responding party" as "anyone named in the application or who responds to it and includes

an intervenor." Rule 40. 7 provides that the Board may relieve against the strict application of these Rules where it considers it advisable.

[8] Schuit received notice from the Union on April 17, 2008 of its application and that notice included an OLRB document, entitled "Notice to Employer for Certification, Construction Industry". It identified Schuit as the responding party, provided notice "to the responding party" and reads in part as follows:

> **An application for certification is a legal proceedings and may affect your legal rights and obligations. You may wish to seek legal advice immediately.**
>
> **Your Response to the application, including schedule A (List of Employees), must be filed with the Board no later than two (2) days after the application for certification was delivered to you.**

[9] Schuit also received directly from the Registrar of the OLRB later that same day a Confirmation of filing of Application for Certification, Construction Industry which included a reminder to respond not later than two days after the Application was delivered.

[10] Schuit did not respond to the application. The applicant's position is that the workers were the employees of an independent sub sub-contractor, Europia Stucco Co., and that no Schuit employees were on site.

[11] On April 29, 2008, the OLRB issued a certificate to the Union pursuant to s. 128.1 of the Act, certifying Schuit as the employer of the three employees.

[12] On May 20, 2008, Schuit filed a request for reconsideration through counsel, asking that the OLRB exercise its discretion, and hear evidence from Schuit supporting its contention that it was not in fact the employer. Schuit stated in the application for re-consideration that the principal of Schuit did not respond to the application because Schuit was not the employer; he assumed it had been sent in error; he had not appreciated the nature and effect of the application or the requirement to respond. The principal of Schuit advised that he was not sophisticated in labour relations matters and did not have legal counsel.

[13] On May 28, 2008, the OLRB dismissed the request for reconsideration, concluding that Schuit had not provided a compelling rationale that would cause it to reconsider its decision. The OLRB noted that it was not necessary to consider whether it would have exercised its discretion under Rule 40.7 to extend the time in which a responding party claiming it is not the employer could file information under s.128.1(3) that there were no employees in the bargaining unit because it did not find there were sufficient grounds for the OLRB to exercise its discretion under s. 114(1) of the LRA to reconsider the decision and revoke the certificate.

[14] The OLRB considered the explanation given by Schuit and found that Schuit had received notice but chose to ignore or disregard the material sent by both the applicant and the Registrar despite the clear statement advising that legal rights and obligations may be affected.

Standard of Review

[15] The applicant characterizes the question on appeal as one of 'true' jurisdiction, and therefore, in accordance with *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, at para 58-59 it must be correct. Schuit argues that the question in issue is the proper interpretation of Rule 25.5 relating to the "responding party", in accordance with s. 128.1 of the LRA that applies only to certification of an "employer". The applicant submits that this is not a question of statutory interpretation, but a true question of jurisdiction requiring the OLRB to determine the extent of its statutory powers.

[16] Although the applicant has characterized the legal issue as relating to jurisdiction - that the OLRB has jurisdiction under s. 128.1 to certify only in the context of an employer - I do not accept that characterization of the question in this appeal.

[17] The Supreme Court of Canada cautioned in *Dunsmuir* at para. 59, that reviewing judges must not brand as jurisdictional issues that are doubtfully so. Jurisdiction is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. These questions will be narrow. In my view, the OLRB is mandated under s. 128.1 of the LRA to determine the merits of the application for certification on the information provided in the application and was entitled to exercise its discretion under s. 114(1) of the LRA on whether to re-consider its determination. The legal issue in this appeal does not relate to the jurisdiction of the OLRB as contemplated in *Dunsmuir*.

[18] As noted in *Dunsmuir* (at paras. 54, 55 and 60), the standard of review for questions of law may depend upon the nature of the question of law. Where the question at issue is one of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, a standard of correctness will apply. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function.

[19] In our view, the applicable standard of review is reasonableness, given that the OLRB is an expert tribunal with a strong mandate to supervise the province's statutory industrial relations regime. The OLRB's decisions are protected by two strong privative clauses, ss. 114 and 116 of the LRA. The issues raised in the application concern the OLRB's exercise of statutory and discretionary powers under the LRA in relation to matters within its exclusive jurisdiction. As a result, the *Dunsmuir* analysis dictates that the OLRB's decisions on these issues are entitled to deference.

[20] Moreover, since *Dunsmuir*, this Court has found the standard of review of the Board's decisions is one of reasonableness (See for example *Abdoulrab v. Ontario (Labour Relations Board)*, [2007] O.J. No. 3155 (Div. Ct.) (August 13, 2007); *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353, et al.* 2008 CanLII 26686 (ON S.C.D.C.), (2008), 91 O.R. (3d) 20 (Div. Ct.); *Khan v. Ontario (Labour Relations Board)*, [2009] O.J. No. 393 (Div. Ct.) (January 21, 2009)).

Analysis

Is the OLRB deprived of jurisdiction to certify a party that is not the employer?

[21] Schuit argues that s. 128.1 of the LRA applies only to certification of an employer, and not to any other party. It submits that the legislature specifically limited the scope of s. 128.1(3) to

employers and does not impose an obligation to respond within the time limit on a non-employer. Schuit, a "responding party" that was not the employer of the employees seeking certification of a trade union, was not obligated to respond within the time limit set out in the legislation. Schuit submits that once it asserted that it was not the employer, the Board should have set aside the previous decision and exercised its discretion under the Rules to extend the two day limit imposed on a "responding party" in Rule 25.5 to permit late filing of a response to the application for certification. Schuit submits that the Board's refusal was unreasonable, given that the purpose of the LRA is to facilitate collective bargaining between employers and trade unions representing their employees, and that ensuring employers are properly identified in certification applications is a cornerstone of this process. I do not agree.

[22] For the reasons given above, the assertion by a party that it is not the employer does not deprive the OLRB of jurisdiction to certify under s.128.1 of the LRA. The OLRB is mandated to determine a number of threshold issues before certification, including the bargaining unit and the employer in the construction industry context. The OLRB had the evidence before it in the application. The Act requires the expeditious response by the employer upon whom the application is served to provide information about employees in the bargaining unit. Rule 2.3 of the Ontario Labour Relations Board Rules of Procedure provides that if a party receiving notice of an application does not file a response as required by the Rules, he or she may be deemed to have accepted all of the facts stated in the application, and the OLRB may decide the case upon the material before it without further notice. In the absence of the employer's response, the Board may certify a union based upon the information in the application. The Board`s position that failure to respond upon proper notice should not be permitted to automatically thwart the speedy process is reasonable in these circumstances.

[23] The OLRB is frequently called upon to determine whether a responding party is an employer, among other threshold issues. This enquiry is within the statutory mandate of the OLRB and within its expertise. Its position that a responding party who is not an employer must respond that there are no employees within the two days is reasonable. The decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* para. 47). The mere assertion by a responding party that it is not the employer cannot invalidate the certification decision of the OLRB.

Reasonableness of exercise of discretion

[24] Schuit submitted that the exercise of discretion could not be reasonable given that certification for a non-employer did not meet the objectives of the LRA, not only in relation to Schuit, but also to Schuit's employees and the employees of Europia Stucco Co.. In essence, the submission is that it was not reasonable for the Board to refuse to put aside the certification and enquire into who the employer was given the importance of the issue.

[25] While the OLRB did not set out all the factors relevant to its exercise of its discretion of whether to reconsider the earlier decision, I cannot conclude that the result was unreasonable. The OLRB noted the circumstances, including Schuit`s position that it was not the employer and that there was no bad faith involved. It noted the dates that indicated a period of time before the request for reconsideration was brought. It fully considered Schuit's submissions and determined that Schuit`s reasons for failing to respond to the application within the time limit were unsatisfactory in the context of the clear notice from both the application and the separate notice from the OLRB regarding

the importance, immediacy and potential legal impact of the matter. Moreover, the OLRB recognizes the important principle of finality of its decisions, particularly where, as here, it had made the decision granting certification.

[26] The Board is an expert tribunal specializing in labour relations and is entitled to considerable deference and respect for its decision-making process and decisions, particularly with respect to the exercise of its discretion in the certification process. It examined Schuit's explanation in the particular factual context before it and found that it did not provide a compelling rationale to put aside a certification decision.

Conclusion

[27] For the above reasons, this application for judicial review is dismissed. The OLRB does not seek costs. The Respondent Union, having been successful will have its costs fixed at $4500, all inclusive, an amount agreed upon by counsel payable by the applicant.

CASE LISTINGS APRIL 2009

PAGE

1. Applications for Certification 87
2. Applications for Declaration of Related Employer 101
3. Sale of a Business 102
4. Applications for Declaration Terminating Bargaining Rights 103
5. Applications for Declaration of Unlawful Strike 104
6. Complaints of Unfair Labour Practice 104
7. Applications for Consent to Early Termination 108
8. Jurisdictional Disputes 108
9. Application for Determination of Employee Status 108
10. Complaints under the Occupational Health and Safety Act 108
11. Construction Industry Grievances 109
12. Appeals – Employment Standards Act 112
13. Appeals – Occupational Health and Safety Act 115
14. First Agreement - Direction 116
15. Pay Equity Act 116
16. Applications Under the Public Sector Labour Relations Transition Act 116
17. Applications for Reconsideration of Board's Decision 116

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2757-07-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Elmara Construction Co. Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Elmara Construction Co. Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0449-08-R: International Union of Operating Engineers, Local 793 (Applicant) v. Star Concrete Pumping Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Star Concrete Pumping Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Star Concrete Pumping Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

1123-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Deanvar Custom Cabinetry & Millwork Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Deanvar Custom Cabinetry & Millwork Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Deanvar Custom Cabinetry & Millwork Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2008-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Decew Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Decew Construction Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the electrical power system sector and the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2435-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aurora Heights Development Inc. and, C.L. Construction & General Contractors Limited (Respondents)

Unit: "all carpenters and carpenters' apprentices in the employ of Aurora Heights Development Inc and C.L. Construction & General Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Aurora Heights Development Inc. and C.L. Construction & General Contractors Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2630-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Ontario Flooring Inc. (Respondent)

Unit: "all marble, tile, terrazzo, cement masons and their respective apprentices, helpers, improvers and all construction labourers in the employ of Ontario Flooring Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3225-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Empire Restoration Inc. (Respondent)

Unit: "all construction labourers in the employ of Empire Restoration Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (6 employees in unit)

3278-08-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Perras Mechanical Services Ltd. (Respondent)

Unit: "all refrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of Perras Mechanical Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of and allrefrigeration and air conditioning mechanics and refrigeration and air conditioning mechanics' apprentices in the employ of Perras Mechanical Services Ltd. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employees in unit)

3354-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. QX Ltd. (Respondent)

Unit: "all construction labourers in the employ of QX Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Town of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working forepersons and persons above the rank of non-working foreperson" (4 employees in unit)

3355-08-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Non-Profit Retirement Residences of Elliot Lake Inc. (Respondent)

Unit: "all construction labourers in the employ of Non-Profit Retirement Residences of Elliot Lake Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all construction labourers in the employ of Non-Profit Retirement Residences of Elliot Lake Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3572-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Andrin Beaches Limited (Respondent)

Unit: "all construction labourers in the employ of Andrin Beaches Limited in the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

3606-08-R: Brick and Allied Craft Union of Canada (Applicant) v. E. S. Fox Limited (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of E. S. Fox Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3776-08-R: Construction Workers Local 53, affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. McLean Taylor Construction Limited (Respondent)

Unit: "all construction labourers, all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors and all teamsters engaged in on site construction in the employ of McLean Taylor Construction Limited in all sectors of the construction industry in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

0019-09-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. 156652 Canada Inc. o/a Encore Steel (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of 156652 Canada Inc. o/a Encore Steel in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all ironworkers and ironworkers' apprentices in the employ of 156652 Canada Inc. o/a Encore Steel in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell and the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0062-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1780199 Ontario Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1780199 Ontario Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 1780199 Ontario Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0088-09-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Contant Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Contant Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and carpenters and carpenters' apprentices in the employ of Contant Construction Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0143-09-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Technologies Dual-ADE Inc. /Dual-ADE Technologies Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of technologies Dual-ADE Inc. /Dual-ADE Technologies Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Technologies Dual-ADE Inc./Dual-ADE Technologies Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Bargaining Agents Certified Subsequent to Vote

3797-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Trudel & Sons Roofing Ltd. (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all employees (workers) of Trudel & Sons Roofing Ltd. who perform the work described in the clarity note below, as well as the metal men who perform the work described in the clarity note below, excluding non-working foremen, hourly service men, flat roofers, aluminium/vinyl applicators, persons engaged in re-roofing, office, warehouse/shop workers, clerical workers and persons above the rank of foreman, engaged in the application of shingles and other roofing materials in new subdivision work (three or more units) in residential low-rise buildings (defined as non-elevated housing of not more than four (4) stories in height excluding basement) in the Province of Ontario, save and except the industrial, commercial and institutional sector. For additional clarity custom homes are excluded" (51 employees in unit) (Clarity Note)

0391-07-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. E-Zee Forming Ltd. (Respondent) v. Universal Workers Union, L.I.U.N.A. Local 183 (Intervener)

Unit: "all construction employees in the employ of Dival Developments Ltd., Tri-Star Forming Ltd. and E-Zee Forming Ltd., including all employees engaged in concrete forming and all work incidental thereto, in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Regional Municipality of Durham, the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland and the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen, those above the rank of non-working foreman, security guards, office, clerical and engineering staff" (6 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	4

3216-08-R: Service Employees International Union Local 2 Brewery, General, and Professional Workers' Union (Applicant) v. Evripos Janitorial Services Ltd. (Respondent)

Unit: "all employees of Evripos Janitorial Services Ltd. at 150 Tunney's Pasture Driveway, 100 Tunney's Pasture Driveway, and 170 Tunney's Pasture Driveway in the City of Ottawa, save and except supervisors and persons above the rank of supervisor" (33 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	10

3270-08-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Sodexo Canada Ltd. (Respondent) v. Labourers International Union of North America, Local 1059 (Intervener)

Unit: "all employees of Sodexo Canada Ltd. engaged in housekeeping/linen services employed at Freeport Health Centre, 3570 King Street East in the City of Kitchener, save and except supervisors, persons above the rank of supervisor and office staff" (52 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked in favour of intervener	7
Number of ballots segregated and not counted	0

3617-08-R: Canadian Union of Public Employees (Applicant) v. The Salvation Army-Toronto Harbour Light Ministries (Respondent)

Unit: "all Residential Care Worker employees employed by Salvation Army- Harbour Light Centre in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (43 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	19

3669-08-R: Ontario Public Service Employees Union (Applicant) v. Huron House Boys' Residential Home (Respondent)

Unit: "all employees of Huron House Boys' Residential Home located in the Municipality of Sarnia, Ontario, save and except Supervisors, Accountant, Administrative Assistant and persons above the rank of Supervisor" (25 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

3674-08-R: Queen's University Faculty Association (Applicant) v. Queen's Theological College(Respondent)

Unit: "all persons employed as members of the academic staff of Queen's Theological College in the Province of Ontario including: (a) persons who hold an appointment to the academic staff with Tenure as defined in (a) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen Theological College as of March 11, 2009; (b) persons who hold an appointment which may lead to Tenure as defined in (b) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (c) persons who hold a Non-renewable Appointment as defined in (c) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (d) persons who hold a Non-renewable Replacement Appointment as defined in (d) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (e) persons who hold a Special Appointment as defined in (e) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (f) persons who hold a Seasonal Appointment as defined in (f) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (g) persons who hold an Adjunct Academic Appointment as defined in (g) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff OF Quees's Theological College as of March 11, 2009; (h) persons who hold a Cross Appointment as defined in (h) of the Definitions article of the Policies and Procedures

Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (i) persons who hold a Joint Appointment as defined in (i) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; (j) persons who hold a Named Chair or Professorship as defined in (j) of the Definitions article of the Policies and Procedures Governing Appointment and Termination of Academic Staff of Queen's Theological College as of March 11, 2009; and (k) persons in categories (a) to (j) above who accept a reduced-time appointment, a reduced workload or a leave of absence. save and except: (a) full voting members of the Board of Management; (b) Associate Deans and those persons at or above the level of Associate Dean, including the Principal and Vice-Chancellor, Vice-Principals, Associate Vice-Principals, Deans, Vice-Deans, and persons providing confidential assistance in respect of labour relations to persons in one or more of those positions; and anyone who is appointed to act in those positions; (c) Emeritus Professors except those who hold a Seasonal Appointment or an Adjunct Academic Appointment; (d) persons, including visiting fellows, who are on leave from another university, institution, firm, or government agency, unless (i) they hold an appointment with academic rank at Queen's Theological College, (ii) they carry a full range of academic responsibilities at Queen's Theological College, and (iii) they are on leave without salary from their home university, institution, firm, or government agency; (e) post-doctoral fellows and research fellows whose remuneration is from an external source; (f) academic and teaching assistants (an Academic Assistant or Teaching Assistant means a person who acts as an assistant to a member of the regular or adjunct academic staff and who performs such duties as tutoring, grading, lab assistance, and research assistance; academic or teaching assistants will normally work under the direct supervision of a member of the academic staff); (g) persons registered as students at Queen's Theological College who teach in the discipline in which they are registered; (h) seconded to positions providing confidential assistance to the Principal or a Vice-Principal; (i) seconded for a term of not less than one year to an administrative, non-academic position, so long as it is the seconded 's principal responsibility; (j) those persons who as guest lecturers provide only occasional instruction in a course; and (k) persons engaged in supervision of students unless they are otherwise members of the bargaining unit." (14 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	2

3721-08-R: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation in the City of Burlington, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements" (2 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

Number of ballots segregated and not counted	0

3733-08-R: St. Jerome's University Academic Staff Association (Applicant) v. St. Jerome's University (Respondent)

Unit: "all persons employed by St. Jerome's University as full-time members of the academic staff holding tenure or tenure track positions or having a contract for 12 months or longer, and professional librarians, save and except administrators at the rank of Associate Dean or higher" (19 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3766-08-R: Canadian Industrial, Entertainment and Warehouse Workers' Union (Applicant) v. Martin Brower of Canada Co. (Respondent) v. Teamsters Local Union No. 419 (Intervener)

Unit: "all the employees of Martin-Brower of Canada Co., in Brampton, Ontario, save and except supervisors, those above the rank of supervisor, probationary employees and persons covered by the certificate issued in Board File No. 3500-08-R dated March 19, 2009" (5 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list 4	
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3781-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Henley Honda Limited (Respondent)

Unit: "all employees of Henley Honda Limited in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, service managers, parts managers, and office and sales representatives" (15 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

0065-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. York Condominium Corporation No. 241 (Respondent)

Unit: "all employees of York Condominium Corporation No. 241 engaged in cleaning services at 250 Scarlett Road, Toronto, Ontario, save and except supervisors, which excepted classification shall include the building superintendant, and persons above the rank of supervisor, office and clerical staff" (2 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0066-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. York Condominium Corporation No. 336 (Respondent)

Unit: "all employees of York Condominium Corporation No. 336 engaged in cleaning services at 260 Scarlett Road, Toronto, Ontario, save and except supervisors, which excepted classification shall include the building superintendent and persons above the rank of supervisor, office and clerical staff" (2 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0113-09-R: Teamsters Canada Rail Conference (Applicant) v. Bombardier Transportation Canada Inc. Bombardier Transportation North America (Respondent)

Unit: "all employees of Bombardier Transportation Canada Inc. Bombardier Transportation North America employed as Crew Dispatchers at the Willowbrook Facility in Toronto, Ontario" (5 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0128-09-R: Service Employees International Union Local 1 Canada (Applicant) v. Victorian Order of Nurses for Canada - Ontario Branch (Respondent)

Unit: "all Home Care Support Workers and Personal Support Workers of Victorian Order of Nurses for Canada - Ontario Branch, servicing in the Region of Peel, save and except registered nurses, supervisors, persons above the rank of supervisor and office and clerical staff" (152 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	152
Number of persons who cast ballots	103
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	99
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	83
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	3

Applications for Certification Dismissed Without Vote

0492-08-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Pratt Hansen Group Inc. (Respondent)

0028-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. De Angelis Construction Inc. (Respondent) v. Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 494 (Intervener)

Applications for Certification Dismissed Subsequent to Vote

1060-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Frost Refrigeration & Air-Conditioning Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Frost Refrigeration and Air Conditioning Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Frost Refrigeration and Air Conditioning Inc. in all other sectors of the construction industry, the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township); the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (22 employees in unit)

3694-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of Waterford Building Maintenance Inc. employed at Havergal College, 1451 Avenue Road, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3877-07-R: Canadian Union of Public Employees (Applicant) v. Town of Tillsonburg (Respondent)

Unit: "all employees in the Town of Tillsonburg Fire Services Department in the County of Oxford save and except volunteer fire fighters, the Deputy Chief and persons above the rank of Deputy Chief" (8 employees in unit)

3914-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of the responding party employed at Canadian Memorial Chiropractic College, 6100 Leslie Street, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballot	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

3933-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of the responding party employed at Bailik Hebrew Day School, 2760 Bathurst Street, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0660-08-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aerostar Electrical Services Inc. (Respondent)

Unit: (see Bargaining Agents Certified without vote)

0699-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of Waterford Building Maintenance Inc. employed at Manhattan Place, 131 Beecroft Road, North York, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

3671-08-R: International Union of Operating Engineers, Local 793 (Applicant) v. Steed and Evans Limited (Respondent)

Unit: "all employees employed by Steed and Evans Limited working in and out of the City of Woodstock in the County of Oxford, Ontario, save and except supervisors and persons above the rank of supervisor and sales staff." (44 employees in unit)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	10

3702-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Silgan Plastics Canada Inc. (Respondent)

Unit: "all employees of Silgan Plastics Canada Inc. in the City of Woodbridge, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (155 employees in unit)

Number of names of persons on revised voters' list	183
Number of persons who cast ballots	170
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	159
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	97
Number of ballots segregated and not counted	10

3705-08-R: Service Employees International Union Local 2 Brewery, General and Professional Workers Union (Applicant) v. Bee-Clean Building Maintenance (Respondent)

Unit: "all employees of Bee Cleaning Building Maintenance at 930 Carling Ave., Ottawa, save and except supervisors and persons above the rank of supervisor." (17 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	2

3779-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Carquest Canada Ltd./Ltee. (Respondent)

Unit: "all employees of the CARQUEST Distribution Centre at 35 Worcester Road, Rexdale, Ontario, save and except supervisors and persons above the rank of supervisor" (93 employees in unit)

Number of names of persons on revised voters' list	97
Number of persons who cast ballots	91
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	64
Number of ballots segregated and not counted	11

0081-09-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Life Labs Laboratory Patient Technicians and Mobile Laboratory Patient Technicians at Patient Service Centre located in Collingwood, Orillia, Stayner and Wasaga (Respondent)

Unit: "all employees of Life Labs in the City of Orillia, the Town of Stayner, the Town of Wasaga Beach and the Town of Collingwood, save and except for supervisors, persons above the rank of supervisor." (30 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	7

0082-09-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Hampton Inn c.o.b. as Hampton Inn Ottawa & Conference Centre (Respondent)

Unit: "all employees of the Hampton Inn Ottawa & Conference Centre employed at 100 and 200 Coventry Road, Ottawa save and except assistant managers, persons above the rank of assistant manager, office and clerical staff." (102 employees in unit)

Number of names of persons on revised voters' list	154
Number of persons who cast ballots	125
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list118	
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	77
Number of ballots segregated and not counted	0

Applications for Certification Withdrawn

2611-04-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. G.M. Tile Ltd. (Respondent) v. Brick and Allied Craft Union of Canada, and Brick and Allied Craft Union of Canada, Local 31, Labourers' International Union of North America, Ontario Provincial District Council (Interveners)

3784-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tri-Cor Construction Inc. (Respondent)

1998-08-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Limen Masonry Limited and/or, Limen Group Ltd. and/or, Limen Masonry (2003) Inc. and/or, Limen Enterprises (2003) Inc. (Respondents) v. Brick and Allied Craft Union of Canada, on its own behalf and on behalf of its affiliated Local Unions 1, 2, 4, 5, 10, 12, 20, 23, 28, 29 and 31, Masonry Industry Employers' Council of Ontario, Ontario Masonry Contractors' Association - BACU Bargaining Committee ("OBBC") and, Ontario Masonry Contractors' Association (Interveners)

2079-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carpet & Rug Outlet Inc. (Respondent)

2665-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Paris Kitchens and/or, Paris Kitchens - a Div. of The Sanderson-Harold Co. Ltd. and/or, The Sanderson-Harold Company Limited (Respondents)

3514-08-R: Canadian Construction Workers' Union (Applicant) v. 2062131 Ontario Ltd. o/a Torbel Group and/or Tor-Bel Developments Inc. and/or Avcon Construction Inc. (Respondent) v. Universal Workers Union, L.I.U.N.A Local 183 (Intervener)

3749-08-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Katz Group Canada Ltd. c.o.b. as Pharmx Rexall Drug Stores Ltd. (Respondent)

3761-08-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. Hospitality Resorts Inc. (Hilton Niagara Falls Fallsview) (Respondent)

0029-09-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. Hospitality Resorts Inc. (Respondent)

0052-09-R: Service Employees International Union Local 1 Canada, (Applicant) v. Hellenic Homes for the Aged, (Respondent) v. Canadian Union of Public Employees (Intevenor)

0197-09-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Paradise Homes and/or Paradise Homes Properties Inc. and/or Paradise Homes corp. and/or Paradise Homes Mayfield Inc. and/or Paradise Homes Churchill Meadows Inc. and/or Paradise Homes Eglinton West Inc. (Respondent)

0209-09-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Queen's University (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3111-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aurora Heights Development Inc. and C.L. Construction & General Contractors Limited (Respondent) *(Granted)*

3275-04-R: Iron Workers District Council of Ontario (Applicant) v. Trentfab Industrial Contractors Inc. and, Trentfab Inc. (Respondents) v. Millwrights Regional Council of Ontario and its Local 2309 (Intervener) *(Withdrawn)*

3799-05-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. 714232 Ontario Ltd. o/a Pro Drywall and, Frontline Contracting Inc. (Respondents) *(Granted)*

2201-07-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Oakville Hydro Corporation and, El-Con Construction Inc. (Respondents) v. Labourers' International Union, Local 183 Ontario Provincial District Council (Intervener) *(Withdrawn)*

0579-08-R: United Food and Commercial Workers Canada, Local 175 (Applicant) v. Pharma Plus Drugmarts Ltd., Katz Group Canada Ltd. and Rexall Stores (Respondent) v. National Automotive, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Intervener) *(Granted)*

0709-08-R: Canadian Office & Professional Employees Union Local 521 (Applicant) v. Aramark Canada Ltd. and, Meno-Ya-Win Health Centre (Respondents) v. Canadian Union of Public Employees and its Local 4373 (Intervener) *(Withdrawn)*

0907-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tri-Cor Construction Inc. and, Deb-Cor Group Ltd. (Respondents) *(Withdrawn)*

2441-08-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters Ontario (Applicant) v. Can-Tech Fire Protection Inc. and, Best-Way Mechanical Contracting Inc. (Respondents) *(Endorsed Settlement)*

3001-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Zzen Group of Companies Limited, Zzen Homes Limited, Zzen Developments Limited, Zzen Design Build Limited (Respondents) *(Withdrawn)*

3032-08-R: Labourers' International Union of North America, Ontario Provincial District Council, on its own behalf and on behalf of its Locals 506, 837 and Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Versa Construction Limited, 539243 Ontario Limited o/a Royal Carpentry Group, Rodan Forming Ltd., Rodan Holdings Ltd., Rodan Site Servicing Ltd. (Respondents) *(Withdrawn)*

3383-08-R: Kenora District Services Board (Applicant) v. Canadian Union of Public Employees (CUPE), Local 191 and Local 5911, International Brotherhood of Electrical Workers (IBEW) Local 1730 (Respondents) *(Terminated)*

SALE OF A BUSINESS

3275-04-R: Iron Workers District Council of Ontario (Applicant) v. Trentfab Industrial Contractors Inc. and, Trentfab Inc. (Respondents) v. Millwrights Regional Council of Ontario and its Local 2309 (Intervener) *(Withdrawn)*

3799-05-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. 714232 Ontario Ltd. o/a Pro Drywall and, Frontline Contracting Inc. (Respondents) *(Granted)*

1870-06-R: International Union of Painters and Allied Trades Local 1891 (Applicant) v. MultiWall and Ceiling Systems Limited,, 714232 Ontario Ltd. o/a Pro Drywall and, Frontline Contracting Inc. (Respondents) *(Granted)*

2201-07-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Oakville Hydro Corporation and, El-Con Construction Inc. (Respondents) v. Labourers' International Union, Local 183 Ontario Provincial District Council (Intervener) *(Withdrawn)*

0579-08-R: United Food and Commercial Workers Canada, Local 175 (Applicant) v. Pharma Plus Drugmarts Ltd., Katz Group Canada Ltd. and Rexall Stores (Respondent) v. National Automotive, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Intervener) *(Granted)*

0580-08-R: United Food and Commercial Workers Canada, Local 175 (Applicant) v. Pharma Plus Drugmarts Ltd., Katz Group Canada Ltd. and Rexall Stores (Respondent) v. National Automotive, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Intervener) *(Granted)*

0709-08-R: Canadian Office & Professional Employees Union Local 521 (Applicant) v. Aramark Canada Ltd. and, Meno-Ya-Win Health Centre (Respondents) v. Canadian Union of Public Employees and its Local 4373 (Intervener) *(Withdrawn)*

0907-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tri-Cor Construction Inc. and, Deb-Cor Group Ltd. (Respondents) *(Withdrawn)*

2441-08-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters Ontario (Applicant) v. Can-Tech Fire Protection Inc. and, Best-Way Mechanical Contracting Inc. (Respondents) *(Endorsed Settlement)*

3001-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Zzen Group of Companies Limited, Zzen Homes Limited, Zzen Developments Limited, Zzen Design Build Limited (Respondents) *(Withdrawn)*

3032-08-R: Labourers' International Union of North America, Ontario Provincial District Council, on its own behalf and on behalf of its Locals 506, 837 and Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Versa Construction Limited, 539243 Ontario Limited o/a Royal Carpentry Group, Rodan Forming Ltd., Rodan Holdings Ltd., Rodan Site Servicing Ltd. (Respondents) *(Withdrawn)*

3383-08-R: Kenora District Services Board (Applicant) v. Canadian Union of Public Employees (CUPE), Local 191 and Local 5911, International Brotherhood of Electrical Workers (IBEW) Local 1730 (Respondents) *(Terminated)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0357-07-R: Gabe Distefano (Applicant) v. Universal Workers Union, L.I.U.N.A. Local 183 (Respondent) *(Endorsed Settlement)*

Unit: "all construction employees of E-Zee Forming Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham.(that OLRB Area No. 8); the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria (that is OLRB Area No. 9); the Towns of Cobourg and Port Hope, and the geographic Townships of Hope, Hamilton, and Alnwick in the County of Northumberland (that is Board Area No. 10); and the County of Simcoe and the District Municipality of Muskoka (the is Board Area No. 18), save and except non-working foremen and persons above the rank of non-working foreman.," (6 employees in unit)

0916-07-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. E-Zee Forming Ltd. and, Construction Workers, Local 6 Affiliated with the Christian Labour Association of Canada (Respondents) *(Endorsed Settlement)*

0460-08-R: Employees of Hilton Garden Inn Kitchener - Cambridge (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) v. 1507952 Ontario Inc. o/a Hilton Garden Inn Kitchener-Cambridge (Intervener) *(Granted)*

3731-08-R: Bhupinder Singh Sohi (Applicant) v. United Steelworkers (Respondent) v. Dynasty Furniture Manufacturing Ltd. (Intervener) *(Dismissed)*

3784-08-R: Employees of Connco Group Ltd. o/a Northern Painters (Applicant) v. Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Respondent) *(Granted)*

Unit: "All employees employed in the ICI sector of the construction industry in the Province of Ontario, that is, painters, painters apprentices, helpers and labourers save and except non-working foremen and persons above the rank of non-working foremen and office and clerical staff" (4 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	1

0142-09-R: Ivan Andrews and a group of employees of Integrated Distribution Systems Limited Partnership c.o.b. as Wajax Industries (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Local 252) (Respondent) v. Integrated Distribution Systems Limited Partnership c.o.b. as Wajax Industries (Intervener) *(Granted)*

Unit: "all employees of Integrated Distribution Systems Limited Partnership c.o.b. as Wajax Industries working in/out of its Mississauga location save and except supervisors, persons above the rank of supervisors, sales staff, office and clerical staff." (62 employees in unit)

0241-09-R: Kyla Forth Gosselin (Applicant) v. Retail, Wholesale and Department Store Union, District Council (Respondent) *(Terminated)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0012-09-U: Benteler Automotive Canada Corporation (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1285, Alvin Ferron, Gerry Harvey, Munir Kahlid, Rubin Riveiro,, Terry Hillier,, Heika Hoffman,, Suzette Hillier,, Piero Izzo,, Frank Mendicino,, Margaret Rivero,, Richard Rivero,, Craig Small, Bob Petrovic,, Ian Scott,, Elgan Murray,, Catherine Godin,, Marilyn Gomes,, Tim Hale, Mike Younghusband,, Linda Johnston,, Bekim Xhemali,, Jason Chutkos,, Clive Johnson, Michelle Bronizewski,, Tammy Allen,, Teresa Chojnowska, and, Brian Siddle (Respondents) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0836-05-U: Michael Locke (Applicant) v. Millwrights and Machine Erectors and Riggers, Local Union 1151 (Respondent) *(Dismissed)*

2187-05-U: Charles Brian Keeling (Applicant) v. Canadian Auto Workers Union (Respondent) v. General Motors of Canada Limited (Intervener) *(Dismissed)*

2087-06-U: Teamsters Local Union 879 (Applicant) v. Lafarge Canada Inc. (Respondent) *(Withdrawn)*

1418-07-U: John Joseph Jarosz (Applicant) v. U.F.C.W. Locals 175 & 633 (Respondent) v. A&P Canada Co. (Intervener) *(Terminated)*

2954-07-U: 2956-07-U: 3441-07-U Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 506, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721, and International Union of Operating Engineers, Local 793 (Applicants) v. Yukon Construction Inc., Central Ontario Regional Council of Carpenters Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, on its Own Behalf and on Behalf of Allied Construction Employees Local 1030 (Respondents) *(Withdrawn)*

3678-07-U: Mary L. Heyens (Applicant) v. Canadian Union of Public Employees and its Local 241 (Respondent) v. The Corporation of the City of Guelph (Intervener) *(Dismissed)*

3810-07-U: Ontario Public Service Employees Union (Applicant) v. The Corporation of the Township of Georgian Bay (Respondent) *(Withdrawn)*

3916-07-U: 0721-08-U: United Food & Commercial Workers, Local 206 (Applicant) v. 1507952 Ontario Limited o/a Hilton Garden Inn Kitchener-Cambridge (Respondent) *(Withdrawn)*

0239-08-U: Lydia Lemieux (Applicant) v. Ontario Nurses' Association (Respondent) v. Guelph General Hospital (Intervener) *(Dismissed)*

0357-08-U: Ontario Public Service Employees Union and Heather Leclerc (Applicant) v. Community Living Huntsville and Beth Ward (Respondent) *(Withdrawn)*

0549-08-U: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Pratt Hansen Group Inc., Willmatt Contracting Ltd. (Respondents) *(Withdrawn)*

0978-08-U: Ana Rodrigues (Applicant) v. Canadian Union of Public Employees and its Local 929.01 and Denzil D'Sousa (Respondent) *(Withdrawn)*

1042-08-U: United Food and Commercial Workers International Union (UFCW Canada), Local 175 (Applicant) v. Morgan Scott Partnership (Respondent) *(Withdrawn)*

1150-08-U: Laurier Lalonde (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 462 (Respondent) v. Agropur Division Natrel (Intervener) *(Dismissed)*

1271-08-U: Communications, Energy & Paperworkers Union, Local 7-0 (Applicant) v. Anishnawbe Mushkiki Community Health Centre (Respondent) *(Withdrawn)*

1390-08-U: Ronald Tecchi (Applicant) v. Canadian Union of Public Employees and its Local 5167 (Respondent) v. City of Hamilton (Intervener) *(Withdrawn)*

1495-08-U: Teamsters Local Union No. 419 (Applicant) v. Turtle Island Recycling Corporation (Respondent) *(Terminated)*

1880-08-U: James Joseph Anderson (Applicant) v. Amalgamated Transit Union Local 113 (Respondent) v. Toronto transit Commission (Intervenor)

1902-08-U: Enzo Miorelli (Applicant) v. CAW-Canada (Respondent) v. Parmalat Canada Inc. (Intervener) *(Terminated)*

2166-08-U: Edward Frisky (Applicant) v. The Canadian Union of Public Employees Local 2486 (Respondent) *(Dismissed)*

2290-08-U: Jose Hernandez (Applicant) v. Canadian Distribution Workers, HBC Logistics Brampton Distribution Centre (Respondent) *(Withdrawn)*

2346-08-U: Melanie Liard, Casandra Lambert, Catherine Du Puy, Shawn Phillips, Amanda Hagman & Chris Houlahan (Applicant) v. CUPE Local # 4698 (Respondent) v. Municipal Corporation of the County of Renfrew (Intervener) *(Terminated)*

2358-08-U: Joseph A. Kubi (Applicant) v. United Food & Commercial Workers Union Locals 175 & 633 (Respondent) *(Dismissed)*

2608-08-U: Stephen McCarroll (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International U. ion (United Steelworkers), Local 4820 (Respondent) v. Haley Industries Limited (Intervener) *(Dismissed)*

2660-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Paris Kitchens and/or, Paris Kitchens - a Div. of The Sanderson-Harold Co. Ltd. and/or, The Sanderson-Harold Company Limited (Respondents) *(Withdrawn)*

2740-08-U: Vijitha Jayasinghe (Applicant) v. UNITE HERE Local 75 (Respondent) v. The Fairmont Royal York (Intervener) *(Dismissed)*

2809-08-U: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. AZZ Blenkhorn & Sawle Limited (Respondent) *(Terminated)*

2853-08-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Carpet & Rug Outlet Inc. (Respondent) *(Withdrawn)*

2936-08-U: Teamsters Local Union No. 879 (Applicant) v. CAA South Central Ontario Inc. (Respondent) *(Terminated)*

2952-08-U: Michael Pongetti (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) v. Dufferin-Peel Catholic District School Board (Intervener) *(Withdrawn)*

3047-08-U: Nicola Lippa (Applicant) v. United Steelworkers Local 9042 (Respondent) *(Withdrawn)*

3131-08-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. Windsor Raceway Inc. (Respondent) *(Withdrawn)*

3136-08-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. Evripos Janitorial Services Ltd. and, SNC-Lavalin ProFac and, Ability Janitorial Services Ltd. (Respondents) *(Withdrawn)*

3144-08-U: Jean Jordan (Applicant) v. Ontario Nurses' Association (Respondent) v. Villa Colombo Homes for the Aged Inc. (Intervener) *(Dismissed)*

3148-08-U: Roland Bowyer (Applicant) v. CUPE Local 5001 (Respondent) *(Withdrawn)*

3228-08-U: Sandra Dennis (Applicant) v. Service Employees International Union, Local 1 Canada (Respondent) v. Niagara Health System (Intervener) *(Endorsed Settlement)*

3242-08-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aurora Heights Development Inc. and, C.L. Construction & General Contractors Limited (Respondents) *(Withdrawn)*

3256-08-U: Christine Stewart (Applicant) v. Communications, Energy and Paperworks Union of Canada, Local 555 (Respondent) *(Dismissed)*

3277-08-U: Dorothy Daneff (Applicant) v. Power Worker's Union (Respondent) v. Hydro One Networks Inc. (Intervener) *(Withdrawn)*

3289-08-U: Murray MacNeill (Applicant) v. Amalgamated Transit Union Local 113 (Respondent) v. The Toronto Transit Commission (Intervener) *(Withdrawn)*

3300-08-U: Nancy Ventimiglia (Applicant) v. National Automobile, Aerospace, Transportation, and General Workers Union of Canada (CAW-Canada) and its Local 444 (Respondent) v. Casino Windsor Limited, operating as Caesars Windsor (Intervener) *(Withdrawn)*

3352-08-U: Matthew Obasohan (Applicant) v. Ontario Public Service Employees Union, Local 547 (Respondent) v. The Crown in Right of Ontario as Represented by the Ministry of Children and Youth Services (Intervener) *(Withdrawn)*

3360-08-U: Power Packaging Employees: Richard Socha, Michael Skibicki, Alojz Tomanzincic, Tularam Balram, Elzbieta Szyluk, Maherunisa Begum, Lidia Laskowska Luszczyk, Pauline Anderson (Applicant) v. United Food and Commercial Workers Canada Local 1000A (Respondent) *(Dismissed)*

3376-08-U: Mike Stroud (Applicant) v. The Society of Energy Professionals (Respondent) v. Ontario Power Generation Inc. (Intervener) *(Dismissed)*

3377-08-U: Prince A. Okoye-Ofumely (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada and its CAW Local 303 (Respondent) v. Del Equipment Limited (Intervener) *(Withdrawn)*

3417-08-U: Desmond L. Allen (Applicant) v. Teamsters Local Union 938 (Respondent) *(Dismissed)*

3438-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and, Sandra Schumacher (Respondents) *(Withdrawn)*

3597-08-U: Gopinath Mahendrarajah (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) and its Local 195 (Respondent) v. Travelodge Windsor Ambassador Bridge (Royal Host & Trigaurd) (Intervener) *(Withdrawn)*

3602-08-U: Mohamed Rishard Anver Nassar (Applicant) v. The National Automobile, Aerospace, Transportation and General Workers' Union of Canada, CAW Canada - and its Local 414 (Respondent) v. Metro Ontario Inc. (Intervener) *(Endorsed Settlement)*

3605-08-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Cyclone Manufacturing Inc. (Respondent) *(Withdrawn)*

3691-08-U: Wendy Yvonne Ziegler (Applicant) v. CAW Local 636 (Respondent) v. Woodstock General Hospital Trust (Intervener) *(Withdrawn)*

3707-08-U: Florence Bulimaibau (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) *(Withdrawn)*

3750-08-U: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. Hurley Corporation (Respondent) *(Withdrawn)*

0012-09-U: Benteler Automotive Canada Corporation (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1285, v. Alvin Ferron et al (Respondent) *(Granted)*

0064-09-U: Canadian Union of Public Employees and its Local 7911 (Applicant) v. United Counties of Prescott-Russell Emergency Medical Services (Respondent) *(Withdrawn)*

0067-09-U: International Union of Operating Engineers, Local 793 (Applicant) v. Aquaterra Construction Ltd. (Respondent) *(Endorsed Settlement)*

0105-09-U: Elementary Teachers' Federation of Ontario (Applicant) v. Niagara District School Board (Respondent) *(Withdrawn)*

0114-09-U: Elementary Teachers' Federation of Ontario (Applicant) v. Upper Canada District School Board (Respondent) *(Withdrawn)*

0115-09-U: Elementary Teachers' Federation of Ontario (Applicant) v. Lambton Kent District School Board (Respondent) *(Withdrawn)*

0116-09-U: Elementary Teachers' Federation of Ontario (Applicant) v. Renfrew County District School Board (Respondent) *(Withdrawn)*

0177-09-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 1-500 (Applicant) v. Bogdon & Gross Furniture Company Ltd. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3511-08-M: Yukon Construction Inc. (Applicant) v. Central Ontario Regional Council of Carpenters and Allied Workers, United Brotherhood of Carpenters and Joiners of America, on behalf of Allied Construction Employees, Local 1030 (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183, International Union of Operating Engineers, Local 793, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Interveners) *(Granted)*

0024-09-M: Metro Ontario Inc. c/o Loeb Fallingbrook (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

3168-06-JD: Communications, Energy and Paperworkers Union of Canada, Local 2003-26 (Applicant) v. Ford Motor Company of Canada, Limited and, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 707 (Respondents) *(Dismissed)*

3303-06-JD: Canadian Union of Public Employees, Local 79, (Applicant) v. City of Toronto and, Toronto Civic Employees Union, Local 416 Canadian Union of Public Employees (Respondents) *(Withdrawn)*

1350-08JD: International Union of Painters and Allied Trades, Local 1819 - Glaziers (Applicant) v. Phoenix Restoration Inc., Phoenix Gunite Services Ltd., Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Respondents) *(Withdrawn)*

2662-08JD: Labourers' International Union of North America, Local 1059 (Applicant) v. Bruce Power LP, and, International Union of Operating Engineers, Local 793 (Respondents) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

2866-08JD: Toronto Civic Employees' Union, Local 416 (Applicant) v. Canadian Union of Public Employees, Local 79 and, City of Toronto (Respondents) *(Withdrawn)*

3340-08JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. TESC Contracting Company Ltd. and, Millwright Local Union 1425 (Respondents) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0085-09-M: International Association of Machinists and Aerospace Workers (Applicant) v. Maitland Lewis Enterprises Ltd. (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2704-08OH: Ian Kechnie (Applicant) v. Cambridge Pallet Ltd. (Respondent) *(Dismissed)*

2717-08OH: Italo Di Cesare (Applicant) v. Canbear Equipment Inc. (Respondent) *(Withdrawn)*

2810-08OH: International Brotherhood of Electrical Workers, Local 303 (Applicant) v. AZZ Blenkhorn & Sawle Limited (Respondent) *(Terminated)*

3134-08OH: Prince A. Okoye-Ofumely (Applicant) v. Del Equipment Limited (Respondent) *(Withdrawn)*

3504-08OH: Karamuddin Ashoori (Applicant) v. Emirfi Shield Plating Inc. (Respondent) *(Terminated)*

3554-08OH: Dave Ryan (Applicant) v. Unisync Group Limited (Respondent) *(Withdrawn)*

3712-08OH: Lee Charon (Applicant) v. One Source Mechanical Inc. (Respondent) *(Withdrawn)*

3719-08OH: John Alderson (Applicant) v. William Day Construction (Respondent) *(Withdrawn)*

3780-08OH: Jesse Herbert (Applicant) v. Highwayman Inn (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

3317-04-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Trentfab Industrial Contractors Inc. and, Trentfab Inc. (Respondents) *(Withdrawn)*

0917-05-G: Millwright Regional Council of Ontario (Applicant) v. Trentfab Industrial Contractors Inc., Brian Kinmond., Owen Kinmond., Sidney piegel., Gary Stern (Respondents) *(Withdrawn)*

2607-07-G: United Association of Journeymen and Apprentices of the lumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicant) v. E. S. Fox Ltd. (Respondent) *(Withdrawn)*

2792-07-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Furfari Paving Co. Ltd. (Respondent) *(Endorsed Settlement)*

2874-07-G: International Association of Bride, Structural, Ornamnetal and Reinforcing Iron Workers, Local Union 721 (Applicant) v. Accu-Line Conveyer Inc. and Centerline Installations (Respondent) *(Endorsed Settlement)*

2875-07-G: Millwrights and Machine Erectors, Local 2309 (Applicant) v. Accu-Line Conveyer Inc. and Centerline Installations (Respondent) *(Endorsed Settlement)*

3305-07-G: 1244-08-G: 2712-08-G: 2713-08-G: 2723-08-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. 614128 Ontario Ltd. o/a Trisan Construction (Respondent) *(Withdrawn)*

3682-07-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cope Construction and Contracting Inc. (Respondent) *(Terminated)*

0522-08-G: Labourers' International Union of North America, Local 625 (Applicant) v. DiPonti Paving Ltd. (Respondent) *(Terminated)*

0639-08-G: Brick and Allied Craft Union of Canada Local 31 (Applicant) v. Acapulco Pools Limited (Gall Construction of America) (Respondent) *(Withdrawn)*

0695-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Flynn Canada Ltd. (Respondent) *(Withdrawn)*

2011-08-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. McNally Construction Inc. (Respondent) *(Withdrawn)*

2261-08-G: Brick and Allied Craft Union of Canada and Brick and Allied Craft Union Canada, Local 31 (Applicant) v. Sterling Tile & Carpet (Respondent) *(Terminated)*

2442-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. Best-Way Mechanical Contracting Inc. (Respondent) *(Withdrawn)*

3189-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Zzen Group of Companies Limited, Zzen Design Build Limited, Zzen Homes Limited and, Zzen Developments Limited (Respondents) *(Withdrawn)*

3214-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Magine Contractors (1994) Inc. (Respondent) *(Endorsed Settlement)*

3301-08-G: Carpenters Union, Central Ontario Regional Council of Carpenters Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Applicant) v. S.O.S. Construction Inc. (Respondent) *(Granted)*

3558-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. J.A.K. Electrical Contractors Limited (Respondent) *(Withdrawn)*

3579-08-G: International Union of Elevator Constructors, Local 96 (Applicant) v. Otis Canada Inc (Respondent) *(Withdrawn)*

3612-08-G: Universal Workers' Union, Labourers' International Union of North America, Local 183 (Applicant) v. Loblaw Companies Limited/Loblaw Properties Limited /IPCF Construction, Division of IPCF Properties Inc./Loblaw Groceterias Co. Limited (Respondent) *(Withdrawn)*

3649-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Loblaw Properties Limited/IPCF Construction a Divsion of IPCF Properties Inc./Loblaw Grocetarias Co., Limited (Respondent) *(Withdrawn)*

3650-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Loblaw Properties Limited/IPCF Construction a Divsion of IPCF Properties Inc./Loblaw Grocetarias Co., Limited (Respondent) *(Withdrawn)*

3660-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinklers Fitters of Ontario (Applicant) v. J.D. Brewster & Associates Ltd. c.o.b. as Fire Protection's Finest (Respondent) *(Withdrawn)*

3661-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. AC Plus Inc. (Respondent) *(Granted)*

3682-08-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Henry Heyink Construction Ltd. (Respondent) *(Withdrawn)*

3685-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. B-Style Concrete Group Corp. (Respondent) *(Granted)*

3706-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. J & B Mechanical Systems 1992 Inc. (Respondent) *(Withdrawn)*

3757-08-G: United Brotherhood of Carpenters and Joiners of America, Local Union 397 (Applicant) v. Waltex Limited (Respondent) *(Endorsed Settlement)*

3790-08-G: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Jemview Gas Piping Limited (Respondent) *(Granted)*

3791-08-G: Sheet Metal Workers' International Association, Local 285 (Applicant) v. Blackstock Environmental Ltd. (Respondent) *(Granted)*

0001-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Titan Exteriors Inc. (Respondent) *(Withdrawn)*

0032-09-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Aecon Utilities (Respondent) *(Withdrawn)*

0046-09-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Altec Sheet Metal Inc. (Respondent) *(Granted)*

0055-09-G: Construction Workers Local 53, Affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. Arcon Electric Limited (Respondent) *(Withdrawn)*

0087-09-G: Universal Worker's Union, L.I.U.N.A., Local 183 (Applicant) v. 1000690 Ontario Inc and/or Liza Homes and/or Brooklin Olde Towne Inc. and/or Oshawa Horizons Inc. and/or Milltree Developments Inc. and/or Oshawa Homes and/or 1351637 Ontario Limited and/or Courtice North Inc. and/or 1154936 Ontario Limited and/or Mansouri Group and/or Casewood Holdings Inc. and/or Whitby Meadows Inc. (Respondent) *(Dismissed)*

0104-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1556019 Ontario Inc. c.o.b. as Burloak Electric (Respondent) *(Withdrawn)*

0106-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vicon Electrical Contractors Inc. and, Vicon Electric 2004 Inc. (Respondents) *(Endorsed Settlement)*

0108-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Terrastone Construction Inc. (Respondent) *(Granted)*

0109-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Louis Jones Construction Ltd. (Respondent) *(Granted)*

0118-09-G: The United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. 3197786 Canada Inc. (Acoustiques S. Mayer) (Respondent) *(Withdrawn)*

0120-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Metro Painters (2004) Limited (Respondent) *(Granted)*

0122-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Luc Joseph Y Renaud c.o.b. as Construction Design L.R. (An Unregistered Business Name) (Respondent) *(Granted)*

0129-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Formcrete Structural Ltd. (Respondent) *(Granted)*

0136-09-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. 1561387 Ontario Inc. o/a Lakehead Heating & Ventilation (Respondent) *(Granted)*

0203-09-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. A.J. Bolla Protective Coatings & Decorating Ltd. (Respondent) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

2049-05-ES: Advantex Express Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

2375-05-ES: Evelyn Martinez (Applicant) v. Maritime-Ontario Freight Lines Ltd., Director of Employment Standards (Respondents) *(Terminated)*

0862-06-ES: Marie E. Pine (Applicant) v. Osprey News Inc/The Sault Star and, Director of Employment Standards (Respondents) *(Terminated)*

2184-06-ES: Raywood C. Dawson (Applicant) v. Alagash Investments Limited o/a Checker Cab and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1377-07-ES: Shawn Pratt (Applicant) v. Robert Sewell o/a Paris Transportation Service and, Director of Employment Standards (Respondents) *(Granted)*

1859-07-ES: Conestoga Materials Handling Ltd. (Applicant) v. John Usher and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3525-07-ES: Stewart Kevin Graham and Anne Louise Graham, directors of Autoland Chrysler (1981) Ltd. (Applicant) v. Director of Employment Standards, Robert Matthews, Terry Jones, Raymond Blais, Michael Leahey, Daniel Williams (Respondents) *(Endorsed Settlement)*

0193-08-ES: Victor Palcic (Applicant) v. Ground Effects Ltd., Mr. Shane Nantau, Ms. Kristin Ahlstedt and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0623-08-ES: Paul A. McInnis (Applicant) v. Oakwood Inn & Golf Club (Grand Bend) Inc. o/a Oakwood Inn & Golf Club and, Director of Employment Standards (Respondents) *(Withdrawn)*

1367-08-ES: Christopher James Sempson (Applicant) v. Belrock and, Director of Employment Standards (Respondents) *(Withdrawn)*

1543-08-ES: Kyle William Harvey (Applicant) v. Jon Robertson o/a Jag Marketing & Communications and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2012-08-ES: Arron Sanders (Applicant) v. Barnes Group Canada Corp. / Le Groupe Barnes Du Canada Cie, Director of Employment Standards (Respondents) *(Withdrawn)*

2073-08-ES: The Salon & Spa at 160 (Applicant) v. Robyne Simpson and, Director of Employment Standards (Respondents) *(Dismissed)*

2403-08-ES: Ziad El-Nachef (Applicant) v. Rona Ontario Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2407-08-ES; 2408-08-ES: Nataliya Baydakova, Victor Chorikov (Applicant) v. York Condominium Corporation No. 201 and, Director of Employment Standards (Respondents) *(Withdrawn)*

2459-08-ES: Jonathan David Hampton (Applicant) v. Electromart (Ontario) Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

2573-08-ES: Robyn McLellan (Applicant) v. Christian Labour Association of Canada and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2842-08-ES: Globe Star Systems Inc. (Applicant) v. Shannon Fitzpatrick and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2965-08-ES: 1120423 Ontario Limited o/a Comda, The Calendar People (Applicant) v. Rodney Lorne Barkhouse and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3000-08-ES: Grail Springs Health & Wellness Spa (Applicant) v. Ms. Chaimovitz and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3008-08-ES: Ismay Pascall (Applicant) v. Resolve Corporation, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3013-08-ES: The Toronto Humane Society (Applicant) v. Megan Mayer, and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3049-08-ES: Brett Russell (Applicant) v. Canadian Automobile Association o/a CAA Insurance Company (Ontario) and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3061-08-ES: William J. Ganzewinkel (Applicant) v. GlassCell Isofab Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3086-08-ES: Burger King Restaurants of Canada Inc. (Applicant) v. Melinda Fedeli and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3112-08-ES: Polar Bear Geo-Thermal Systems Inc. (Applicant) v. Michael Mai,, Elissa Mai and, Director of Employment Standards (Respondents) *(Dismissed)*

3115-08-ES: Catherine Gould (Applicant) v. Integritie (Canada) Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3165-08-ES: Canadian National Federation of Independent Unions (Applicant) v. Brenda Lowes and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3175-08-ES: Joe Gervasi (Applicant) v. VT Auto Body Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3266-08-ES: Yanmei Zhu (Applicant) v. Baass Business Solutions Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3280-08-ES: Unique Tool and Gauge Inc. (Applicant) v. Mark Panek and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3307-08-ES: Hollywood Panini Gelato Ltd. (Applicant) v. Hajar Attari and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3313-08-ES: Whitson Manufacturing Inc. (Applicant) v. Tanya Savard and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3344-08-ES: Barbara Mitchell (Applicant) v. Associated Toronto Taxicab Co-operative Limited o/a Co-Op Cabs, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3353-08-ES: Ping Lee (Applicant) v. Betty's Law Office, Director of Employment Standards (Respondents) *(Dismissed)*

3357-08-ES: Roof Master KM Ltd. (Applicant) v. Zekruddin Erfany and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3364-08-ES: Northern Coatings Ltd. (Applicant) v. Laura Hinds and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3411-08-ES: Dwayne S. Jorgensen (Applicant) v. Logic Plus Solutions Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3454-08-ES: Steven Green (Applicant) v. LASON Canada Company and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3456-08-ES: Vision Coaters Canada Ltd. (Applicant) v. Tien T. Nguyen and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3460-08-ES: Parmanand Pasram (Applicant) v. Pro-Fab International Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3479-08-ES: Saifullah Syed (Applicant) v. Canadian Corps of Commissionaires (Ottawa Division), Director of Employment Standards (Respondents) *(Withdrawn)*

3480-08-ES: Mahavir Dhirwan (Applicant) v. 1559422 Ontario Inc. o/a Kamasutra Indian Restaurant & Wine Bar and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3484-08-ES: David Schulz (Applicant) v. Agincourt Chrysler Plymouth Motors Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3524-08-ES: Salcros Maintenance Contractors Ltd. (Applicant) v. Robert Higginson and, Director of Employment Standards (Respondents) *(Terminated)*

3539-08-ES: Monique Skoczen (Applicant) v. Bird Packaging Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3545-08-ES: Susan Nikkila (Applicant) v. SRT Med-Holdings Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3547-08-ES: Stefan Tarvids (Applicant) v. General Motors of Canada Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3548-08-ES: Erin Napier (Applicant) v. 1589602 Ontario Inc. o/a Shell/Harveys and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3553-08-ES: Maria Ramirez (Applicant) v. Newmar Window Manufacturing Inc., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3556-08-ES: Jim Bonnett (Applicant) v. Archie's Auto Wreckers and, Director of Employment Standards (Respondents) *(Dismissed)*

3577-08-ES: Isabel Perez (Applicant) v. H Q N Industrial Fabrics Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3601-08-ES: Stephen LaForest (Applicant) v. Acclaim Ability Management Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3637-08-ES: Catherine Root (Applicant) v. Brockville Financial Services Ltd. (The Money Store) and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3639-08-ES: Knapp Appliances (R.B. Knapp Industries Inc.) (Applicant) v. Andre Bellehumeur and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3640-08-ES: 3641-08-ES: Roger B. Luttrell o/a Tri Trell (Applicant) v. Michel Picard and, Director of Employment Standards (Respondents) *(Dismissed)*

3658-08-ES: James C.S. Foerter (Applicant) v. Continuous Colour Coat Limited o/a Metal Koting, and, Director of Employment Standards (Respondents) *(Terminated)*

3683-08-ES: Christian Labour Association of Canada (Applicant) v. Robyn Lee McLellan, Director of Employment Standards (Respondents) *(Dismissed)*

3725-08-ES: Russell Urbanoski a Director of 3761355 Canada Limited operating as Canadian Select Farm Foods - Estate #31-455510 (Applicant) v. Rick Charlebois, Lori Fries, Jason Lecuyer, Sean Strain, Dave Steele, Adam Resch and, Director of Employment Standards (Respondents) *(Dismissed)*

3735-08-ES: New Santorio Inc. (Applicant) v. Yu Fen Jiang and, Director of Employment Standards (Respondents) *(Dismissed)*

3759-08-ES: Neil Westgarth (Applicant) v. 620369 Ontario Inc., o/a Herman's Building Centres and, Director of Employment Standards (Respondents) *(Dismissed)*

0053-09-ES: Wheels Automotive Dealer Supplies Inc. (Applicant) v. Cameron Smith and, Director of Employment Standards (Respondents) *(Terminated)*

0074-09-ES: Princeton Apartments Ltd. (Applicant) v. Gervend Bajan and, Director of Employment Standards (Respondents) *(Terminated)*

0097-09-ES: CRG Towing (Applicant) v. Kirk Kerr and, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

3890-07-HS: J. David Crawford (Applicant) v. Durham District School Board, and, Marc Dugas, Inspector (Respondents) *(Withdrawn)*

0043-08-HS: Trudel & Sons Roofing Ltd. (Applicant) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, and Goran Blanusa, Inspector (Respondents) *(Withdrawn)*

0900-08-HS: The Corporation of the City of Timmins (Applicant) v. Allen Armstrong, Inspector (Respondent) *(Terminated)*

1152-08-HS: Trudel & Sons Roofing Ltd. (Applicant) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, and Michael Rumble, Inspector (Respondents) *(Withdrawn)*

3665-08-HS: Strabag Inc. (Applicant) v. Labourers' International Union of North America, Local 837, Jullie Ritchie, **Inspector (Respondents)** ***(Granted)***

3737-08-HS: Consolidated 2000 Inc. (Applicant) v. Form Work Council of Ontario, c/o Universal Workers Union, Labourers International Union of North America, Local 183 and, Phillip Ferreira, Inspector (Respondents) *(Granted)*

3774-08-HS; 3775-08-HS: Toronto District School Board (Applicant) v. Canadian Union of Public Employees, Local 4400 and, Shawn Thompson, Inspector (Respondents) *(Dismissed)*

0091-09-HS: Grand River Hospital Corporation (Applicant) v. CAW-Canada, Local 302, Ontario Nurses' Association, United Steelworkers of America, Local 838, Communications, Energy and Paperworkers Union of Canada, Local 2003, Professional Institute of the Public Service of Canada and, Richard Sutherland, Inspector (Respondents) *(Granted)*

FIRST AGREEMENT - DIRECTION

0204-08-FC: United Food & Commercial Workers, Local 206 (Applicant) v. 1507952 Ontario Limited o/a Hilton Garden Inn Kitchener-Cambridge (Respondent) *(Withdrawn)*

PAY EQUITY ACT

4042-05-PE: Canadian Union of Public Employees Local 1328 (Applicant) v. Toronto Catholic District School Board (Respondent) *(Dismissed)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

0092-08-PS: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Health Care, London and, St. Thomas-Elgin General Hospital (Respondents) v. Ontario Nurses' Association and, National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27 and 302 (Interveners) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3754-05-ES: Tony Shearing (Applicant) v. Jamesway Construction Inc., and, Director of Employment Standards (Respondents) *(Granted)*

0081-08-U: Abela Berhanue (Applicant) v. Universal Workers Union L.I.U.N.A. Local 183 (Respondent) v. Metropolitan Toronto Condominium Corp. No. 638 (Intervener) *(Dismissed)*

0218-08-OH: Susan Hoesterey-Wilker (Applicant) v. FIO Automotive Canada Corporation (Respondent) *(Dismissed)*

0239-08-U: Lydia Lemieux (Applicant) v. Ontario Nurses' Association (Respondent) v. Guelph General Hospital (Intervener) *(Dismissed)*

0434-08-U: Jerry Schram (Applicant) v. Elementary Teachers' Federation of Ontario (Respondent) v. Avon Maitland District School Board (Intervener) *(Dismissed)*

1290-08-U: Dorota Geca (Applicant) v. Christian Labour Association of Canada (Respondent) *(Dismissed)*

1563-08-U: Cancoil Thermal Corporation (Applicant) v. United Food and Commercial Workers Local 175 (Respondent) *(Dismissed)*

2051-08-ES: Dengru Wu (Applicant) v. The Corporation of the City of Cambridge (Respondent) *(Dismissed)*

2381-08-ES: Dengru Wu (Applicant) v. The Corporation of the City of Cambridge and, Director of Employment Standards (Respondents) *(Dismissed)*

3196-08-U: Zaga Jovanovic (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Humber Institute of Technology and Advanced Learning (Intervener) *(Dismissed)*

3267-08-ES: Peter Ruttan (Applicant) v. Durham Housing Non-Profit Corporation and, Director of Employment Standards (Respondents) (Disposition not available)

CASE LISTINGS MAY 2009

PAGE

1. Applications for Certification 121
2. Applications for Declaration of Related Employer 133
3. Sale of a Business 134
4. Applications for Declaration Terminating Bargaining Rights 134
5. Applications for Declaration of Unlawful Strike 136
6. Complaints of Unfair Labour Practice 136
7. Application for Interim Order 138
8. Trusteeship 138
9. Applications for Consent to Early Termination 138
10. Jurisdictional Disputes 138
11. Complaints under the Occupational Health and Safety Act 139
12. Construction Industry Grievances 139
13. Applications for Accreditation 142
14. Appeals – Employment Standards Act 142
15. Appeals – Occupational Health and Safety Act 147
16. Pay Equity 148
17. Referral from Minister (Sec. 3 (2)) 148
18. Applications for Reconsideration of Board's Decision 148

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 2009

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0466-07-R: Universal Workers Union, Labourers' International Union of North America Local 183(Applicant) v. Cachet Estate Homes and/or Cachet Estate Homes Inc. and/or 623390 Ontario Limited (Respondent)

Unit: "all construction labourers in the employ of Cachet Estate Homes and/or Cachet Estate Homes Inc. and/or 623390 Ontario Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing andTrafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; and the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

1599-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Streetcar Construction Inc. and Streetcar Developments Inc. (Respondent)

Unit: "all construction labourers employed by Streetcar Construction Ltd. and Streetcar Developments Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working forepersons and persons above the rank of non-working foreperson" (5 employees in unit)

1817-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Asco Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Asco Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and in the employ of Asco Construction Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1033-08-R: IBEW - Construction Council of Ontario (Applicant) v. Tilco Electric Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Tilco Electric Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Tilco Electric Ltd., in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman"(4 employees in unit)

1215-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Watech Services Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Watech Services Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Watech Services Inc. in all sectors of the construction industry in the County of Lambton, the County of Simcoe and the District Municipality of Muskoka, and that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of on-working foreman" (5 employees in unit)

1955-08-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Imperial Design-Build Inc. (Respondent)

Unit: "all construction labourers in the employ of Imperial Design-Build Inc, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the Responding party in all other sectors of the construction industry in the Regional Municipality of Durham (except for those towns of Ajax and Pickering), the geographic township of Cavan in the County of Peterborough and the geographic township of Manvers in the County of Victoria, save and exept non-working foremen and persons above the rank of non-working foreman.

2431-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Parkbridge Lifestyle Communities Inc. (Respondent)

Unit: "all construction labourers in the employ of Parkbridge Lifestyle Communities Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

2571-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Apaland Landscape Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of Apaland Landscape Contracting Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3119-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Consolidated Drilling and Blasting Inc. (Respondent)

Unit: "all construction labourers in the employ of Consolidated Drilling and Blasting Inc. in all sectors of the construction industry in the District of Manitoulin (except that portion of the District of Manitoulin which comes within the Board Area #17), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

3538-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Al Buonaiuto c.o.b. as King Decor (Respondent)

Unit: "all painters and painters' apprentices in the employ of Al Buonaiuto c.o.b. as King Decor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters'

apprentices in the employ of Al Buonaiuto c.o.b. as King Decor in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0221-09-R: Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Starwood Drywall Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Starwood Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Starwood Drywall Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0235-09-R: Labourers' International Union of North America, Local 625 (Applicant) v. Moccia Concrete & Concrete Products Ltd. (Respondent)

Unit: "all construction labourers in the employ of Moccia Concrete & Concrete Products Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Moccia Concrete & Concrete Products Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0297-09-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 and United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Walter Motchula operating as Installations W.M. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Walter Motchula operating as Installations W.M. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Walter Motchula operating as Installations W.M. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0334-09-R: The International Brotherhood of Painters and Allied Trades, Local Union 205 (Applicant) v. Connco Group Ltd. o/a Northern Painters (Respondent)

Unit: "all painters and painters' apprentices in the employ of Connco Group Ltd. o/a Northern Painters in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Connco Group Ltd. o/a Northern Painters in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0356-09-R: Construction Workers Local 52, affiliated with the Christian Labour Association of Canada (Applicant) v. Can-Am Pipe Works Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Can-Am Pipe Works Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships

of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0361-09-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ahad Khoshbaten and Robabeh Afraz c.o.b. as Custom Painting and Renovation (Respondent)

Unit: "all painters and painters' apprentices in the employ of Ahad Khoshbaten and Robabeh Afraz c.o.b. as Custom Painting and Renovation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Ahad Khoshbaten and Robabeh Afraz c.o.b. as Custom Painting and Renovation in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0446-09-R: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Edward Paul Jursa c.o.b. as E.P.J. Construction (Respondent)

Unit: "all journeymen and apprentice bricklayers and all construction labourers in the employ of Edward Paul Jursa c.o.b. as E.P.J. Construction in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0514-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Tarvudd Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Tarvudd Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Tarvudd Construction Inc. in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0530-09-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Horizon Concrete Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Horizon Concrete Construction Ltd. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0580-09-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Concrete & Forming Ltd. (Respondent)

Unit: "all construction labourers in the employ of Ottawa Concrete & Forming Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Ottawa Concrete & Forming Ltd. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Bargaining Agents Certified Subsequent to Vote

3778-08-R: Canadian Union of Public Employees Local 4308 (Applicant) v. Prisoners with HIV/AIDS Support Action Network (Respondent) v. Canadian National Federation of Independent Unions (Intervener)

Unit: "all employees employed by Prisoners with HIV/AIDS Support Action Network working in and out of the City of Toronto, save and except supervisors and persons above the rank of supervisor" (9 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	3

0008-09-R: Ontario Public Service Employees Union (Applicant) v. Canadian Mental Health Association, Lambton County Branch (Respondent)

Unit: "all employees of the Canadian Mental Health Association, Lambton County Branch, employed in the County of Lambton, save and except Program Leads and Managers, persons above the rank of Program Lead or Manager, Housing Specialists, accounting assistants, students employed pursuant to a cooperative education program and students employed during the school vacation period pursuant to external funding specifically provided for the employment of such students" (47 employees in unit) *(Having regard to the agreement of the parties.) (Clarity note)*

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	9

0124-09-R: Service Employees International Union Local 1 Canada (Applicant) v. Kingsway Arms Management (at Applewood) Inc. (Respondent)

Unit: "all employees of Kingsway Arms Management (at Applewood) Inc. in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, registered nurses and office and clerical staff" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on	0

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	0

0152-09-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of Hamilton (Respondent)

Unit: "all child and youth care, child protection workers and professional staff regularly employed twenty-four hours or less per week by Children's Aid Society of Hamilton in the Regional Municipality of Hamilton, save and except co-ordinators, person above the rank of coordinators and those persons already represented by a trade union" (47 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

0228-09-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 affiliated with the International Brotherhood of Teamsters (Applicant) v. Canada Bread Division Limited (Respondent) *(Having regard to the agreement of the parties.)*

Unit: "all full-time and part-time employees in the employ of Canada Bread Division Limited at the depot located in the City of Kingston save and except supervisors, persons above the rank of supervisor, and office staff" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0263-09-R: Ontario Nurses' Association (Applicant) v. Wellington House Nursing Home (Respondent)

Unit: "all Registered Nurses and Temporary Licensed Nurses employed in a nursing capacity at Wellington House in the Town of Prescott save and except the Director of Care and persons above the rank of Director of Care" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5

Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0288-09-R: The Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. The Corporation of the Town of Petawawa (Respondent)

Unit: "all volunteer firefighters as defined by the Fire Protection and Prevention Act, 1997, as may be amended, employed by the Corporation of the Town of Petawawa, save and except deputy chiefs, persons above the rank of deputy chief, office and clerical staff and persons covered by any existing collective agreement" (29 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0300-09-R: UNITE HERE (Applicant) v. Delta Toronto East (Respondent)

Unit: "all Health Club/Pool employees of the Delta Toronto East at 2035 Kennedy Road, Scarborough, Ontario, save and except supervisors and persons above the rank of supervisor" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0321-09-R: Canadian Union of Public Employees (Applicant) v. Alliance for South Asian Aids Prevention (ASAAP) (Respondent)

Unit: "all employees employed by the Alliance for South Asian Aids Prevention (ASAAP) in the City of Toronto save and except supervisors and persons above the rank of supervisor" (11 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0327-09-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. St. Thomas Elgin General Hospital Auxiliary Respondent)

Unit: "all employees of the St. Thomas Elgin General Hospital Auxiliary working in Blue Note Café in the City of St. Thomas, Ontario, save and except office staff and supervisors and persons above the rank of supervisors" (10 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0384-09-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Victorian Order of Nurses for Canada - Ontario Branch (Respondent)

Unit: "All employees of The Victorian Order of Nurses for Canada - Ontario Branch, Thunder Bay and District Site, employed in the Adult Day Program, save and except supervisors and persons above the rank of supervisor and office and clerical employees." (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0397-09-R: UNITE HERE (Applicant) v. 2194776 Ontario Inc. o/a Comfort Inn Meadowvale (Respondent)

Unit: "all employees of 2194776 Ontario Inc. o/a Comfort Inn Meadowvale at 2420 Surveyor Road, Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, executive housekeeper, sales, and co-op students" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

0413-09-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Brenntag Canada Inc. (Respondent)

Unit: "all employees of Brenntag Canada Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and persons for whom any trade union held bargaining rights as of the application date of this matter" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

0436-09-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Penske Logistics (Respondent)

Unit: "all employees of Penske Logistics located in the Regional Municipality of Chatham-Kent, Ontario, save and except auditors and supervisors and those above the rank of supervisor" (116 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	114
Number of persons who cast ballots	93
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	92
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	72
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	1

0448-09-R: Canadian Union of Public Employees (Applicant) v Corporation of the Town of Amprior (Respondent)

Unit: "all employees of the Corporaton of the Town of Amprior, save and except foremen, persons above the rank of foreman, office and clerical staff, library, fire department, engineering and museum employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation periods. *(Having regard to the agreement of the parties.)*

Applications for Certification Dismissed Without Vote

3298-06-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Precision Concrete Ltd. (Respondent) v. Construction Workers Local 53, affiliated with Christian Labour Association of Canada (Intervener)

1372-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hollandia Land & Environmental Solutions (Respondent)

2363-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. 1714458 Ontario Limited and/or Edgecon Contracting Corp. and/or Edgecon Construction Inc. and/or Edge-Con Contracting (Respondent)

Applications for Certification Dismissed Subsequent to Vote

3884-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Pre-Eng Contracting Ltd. and Constaff Construction Ltd. Respondent) v. Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Intervener)

Unit: " All construction labourers in the employ of the Responding Party in all other sectors of the construction industry, except the ICI sector, in Board Areas 8, 9 and 26, save and except non-working foremen and those above the rank of non-working foreman. "

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	1

2692-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Pioneer Construction Inc. (Respondent) v. Northern Construction Workers' Union, Teamsters Local Union No. 230 (Interveners)

Unit: "all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman. Employees covered by the collective agreement between Pioneer Construction Inc. and

Teamsters Local 230 working out of North Bay and working in sectors other than the industrial, commercial and institutional sector who primarily work in OLRB Geographic Area 16 are not included in the bargaining unit." (132 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of intervener	36
Number of ballots segregated and not counted	2

0205-09-R: International Association of Machinists and Aerospace Workers (Applicant) v. Transfreight Integrated Logistics Inc. (Respondent)

Unit: "all employees of Transfreight Integrated Logistics Inc. in the City of Cambridge, Save and except office and clerical staff, supervisors and persons above the rank of supervisor. Clarity Note: The use of the word "supervisor" is meant to refer to Team Leaders and those above the rank of Team Leader, including those individuals who exercise managerial functions, or are employed in a confidential capacity, within the meaning of section 1(3)(b) of the Labour Relations Act, 1995." (26 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	165
Number of persons who cast ballots	151
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names appear on voter's list	124
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	124

0336-09-R: Universal Workers Union, Labourers' International Union of North America Local 183(Applicant) v. Asbury Building Services Inc. (Respondent)

Unit: "all employees of Asbury Building Services Inc. employed at 11 King Street West, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff." (10 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

0365-09-R: Ontario Nurses' Association (Applicant) v. Extendicare Halton Hills (Respondent)

Unit: "all Registered Nurses and Nurses with temporary Certificate of Registration employed by Extendicare Halton Hills in the Town of Georgetown, save and except the Assistant Director of Care and persons above the Assistant Director of Care." (12 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

0462-09-R: Retail, Wholesale and Department Store Union, District Council of the United Food & Commercial Workers International Union (Applicant) v. Northern Uniform Service Corp. (Respondent)

Unit: "All employees of Northern Uniform Service Corp. in the City of Greater Sudbury, save and except foremen and persons above the rank of foreman, service specialists, and office and sales staff" (37 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	8

Applications for Certification Withdrawn

1307-07-R: Communications, Energy and Paperworkers Union of Canada (CEP) (Applicant) v. GreenField Ethanol Inc. (Respondent)

0301-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aluma Systems (Respondent)

1497-08-R: International Union of North America, Local 1059 (Applicant) v. Berdan Paving Ltd. (Respondent)

2002-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Maple Lane Homes Incorporated and/or, Maple Lane Lands & Development Co. Ltd. and/or, Visa Construction North Ltd. and/or, Visa Construction Co. Limited (Respondents)

2877-08-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. David Lopinski Electric Ltd. (Respondent)

3359-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dalren Limited (Respondent)

3566-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. Front Construction Industries Inc. (Respondent) v. Greater Ontario, Regional Council of Carpenters, Drywall and Allied Workers, Local 494 (Intervener)

0278-09-R: Canadian Union of Public Employees (Applicant) v. Town of Penetanguishene (Respondent)

0401-09-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Modern Landfill Inc. and, J.W. Sheldrick Sanitation Ltd. and, CNN Staffing Solutions Inc. (Respondents) v. Teamsters Local Union No. 879 (Intervener)

0433-09-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. B'iggs Fire Suppression Inc. (Respondent)

0572-09-R: Service Employees International Union Local 2 Brewery, General and Professional Workers' Union (Applicant) v. UGL Unicco (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1356-07-R: CUPE, Local 145 (Applicant) v. William Osler Health Centre, The Healthcare Infrastructure Company of Canada Inc. and, Carillion Services Inc. (Respondents) *(Dismissed)*

3173-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Maple Lane Homes Incorporated and/or, Maple Lane Lands & Development Co. Ltd. and/or, Visa Construction North Ltd. and/or, Visa Construction Co. Limited (Respondents) *(Withdrawn)*

2443-06-R: Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Kinectrics Inc. and, Ontario Power Generation Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("Power Workers' Union") (Intervener) *(Granted)*

2444-06-R: Canadian Union of Skilled Workers (Applicant) v. Kinectrics Inc. and, Ontario Power Generation Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("Power Workers' Union") (Intervener) *(Granted)*

1964-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Richmond Tile Limited (formerly known as Richmond Tile Ltd.), Caledonia & Drywall Ltd. and, Capital Contracting & Interiors Inc. (Respondents) *(Granted)*

1605-08-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sethi Group Inc. and, Harpreet Sethi c.o.b. as Pryance Hospitality Inc. (an unregistered business name) and/or Priyance Hospitality Inc. (Respondents) *(Granted)*

3174-08-R: Professional Institute Staff Association (Applicant) v. Professional Institute of the Public Service of Canada, Professional Institute Building Trust, 250 Tremblay National Office Corporation (Respondents) *(Withdrawn)*

3767-08-R: Powerstream Inc. (Applicant) v. Local Union 636 of the International Brotherhood of Electrical Workers and, Power Workers' Union, Canadian Union of Public Employees Local 1000 (Respondents) *(Granted)*

SALE OF A BUSINESS

2443-06-R; 2444-06-R: Labourers' International Union of North America, Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 1059 (Applicant) v. Kinectrics Inc. and, Ontario Power Generation Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("Power Workers' Union") (Intervener) Canadian Union of Skilled Workers (Applicant) v. Kinectrics Inc. and, Ontario Power Generation Inc. (Respondents) v. Power Workers' Union, CUPE Local 1000, C.L.C. ("Power Workers' Union") (Intervener) *(Granted)*

1964-07-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Richmond Tile Limited (formerly known as Richmond Tile Ltd.), Caledonia & Drywall Ltd. and, Capital Contracting & Interiors Inc. (Respondents) *(Granted)*

1605-08-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sethi Group Inc. and, Harpreet Sethi c.o.b. as Pryance Hospitality Inc. (an unregistered business name) and/or Priyance Hospitality Inc. (Respondents) *(Granted)*

3174-08-R: Professional Institute Staff Association (Applicant) v. Professional Institute of the Public Service of Canada, Professional Institute Building Trust, 250 Tremblay National Office Corporation (Respondents) *(Withdrawn)*

3767-08-R: Powerstream Inc. (Applicant) v. Local Union 636 of the International Brotherhood of Electrical Workers and, Power Workers' Union, Canadian Union of Public Employees Local 1000 (Respondents) *(Granted)*

0073-09-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Devgroup Limited, Devgroup Technical Services, Powerline Utility Contractors Inc. and 2147836 Ontario Inc. (Respondents) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0021-09-R: Employees of HD Industrial Services Inc. (Applicant) v. United Steelworkers Local 153 (Respondent) *(Dismissed)*

Unit: "the employers personnel operating from the employers service centre in the City of Hamilton, save and except forepersons, persons above the rank of foreperson, office and sales staff." (9 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots ast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

0099-09-R: Chad Sykes (on behalf of the bargaining unit of Teamsters Local 880 Penske Logistics) (Applicant) v. Teamsters Local Union 880 (Respondent) *(Granted)*

Unit: "all material handlers, drivers and sub-assemblers, clerical and quality clerks, employed by the Company and working exclusively at the site located at 650 Riverview Drive, Chatham, Ontario." (88 employees in unit)

Number of names of persons on revised voters' list	116
Number of persons who cast ballots	85
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	85
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	41
Number of ballots marked against respondent	44
Number of ballots segregated and not counted	0

0138-09-R: Chris Blount (Applicant) v. Teamsters Local Union 938 (Respondent) v. Travelway Inn (Sudbury) Ltd. Partnership (Intervener) *(Granted)*

Unit: "all employees of Travelway Inn (Sudbury) Ltd. in the City of Sudbury, save and except head housekeeper, persons above the rank of head housekeeper, and restaurant employees" (21 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	13
Number of ballots segregated and not counted	0

0184-09-R: John Sybiraj (Applicant) v. International Union of Operating Engineers Local 793 (Respondent) v. The Corporation of the Town of Arnprior

Unit: "all employees of the Corporation of the Town of Arnprior, save and except foremen, persons above the rank of foremen, caretakers, plant operators, office and clerical employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

0214-09-R: Cardoso, Paula, Indarjit, Devindra, and Shivaharan Monte (Applicant) v. United Steelworkers, District 6 (Respondent) v. Acer America Corporation (Intervener) *(Dismissed)*

0243-09-R: Don Langevin (Applicant) v. Teamsters, Local Union 91 (Respondent) v. Boldrick Bus Service Limited (Intervener) *(Dismissed)*

Unit: "all bus drivers employed by Boldrick Bus Service Limited working in and out of the Trenton yard at 1029 County Road 40, Trenton, Ontario and the Tweed yard at 341 Victoria Street North, Tweed, Ontario for the Tri-Board Authority save and except supervisors, persons above the rank of supervisor, coordinators, dispatchers, mechanics, owners, monitors, full time office/clerical staff." (50 employees in unit)

Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of respondent	31
Number of ballots marked against respondent	16
Number of ballots segregated and not counted	3
Number of names of persons on revised voters' list	51
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47

0315-09-R: John Kavanagh (Applicant) v. Canadian Union of Public Employees (CUPE) Local 4266-07 (Respondent) *(Granted)*

0588-09-R: Wendy Dean (Applicant) v. UNITE HERE Ontario Council & its Local 75 (Respondent) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0476-09-U: The Crown in Right of Ontario as represented by The Ministry of Community Safety and Correctional Services (Applicant) v. Ontario Public Service Employees Union, Ontario Public Service Employees Union, Local 234, and Emidio Casullo (Respondent) *(Endorsed Settlement)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3292-06-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Precision Concrete Ltd. Marty Vanderydt, Ken Zyp and Construction Workers Local 53 affiliated with Christian Labour Association of Canada (Respondents) *(Dismissed)*

0840-07-U: Ontario Public Service Employees Union, Robert Gordon, Michael McKinnon, William Bradley, Robert Moreau, Joe D'Andrea and Stephen Lonsdale (Applicant) v. Government of Ontario (Ministry of Community Safety and Correctional Services) (Respondent) *(Dismissed)*

2543-07-U: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (Caw-Canada) (Applicant) v. National Waste Services Inc. (Respondent) Withdrawn)

0514-08-U: Health Care and Service Workers Union, Local 304 affiliated with the Christian Labour Association of Canada (Applicant) v. Whispering Pines Retirement Home Respondent) *(Withdrawn)*

1005-08-U: Chau Ngoc Thao (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. OLYMEL, S.E.C./L.P. (Intervener) *(Dismissed)*

1345-08-U; 3724-08-U: Professional Institute Staff Association (Applicant) v. Professional Institute of the Public Service of Canada (Respondent) *(Withdrawn)*

1506-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Berdan Paving Ltd. (Respondent) *(Withdrawn)*

1685-08-U: Regina Ip (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Centre for Addiction & Mental Health (Intervener) *(Dismissed)*

2395-08-U: Brian Douglas Hansen (Applicant) v. CAW Local 2168 (Respondent) v. ZF Heavy Duty Steering Inc. (Intervener) *(Withdrawn)*

2537-08-U: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. 1714458 Ontario Limited and/or Edgecon Contracting Corp. and/or Edgecon Construction Inc. and/or Edge-Con Contracting (Respondent) *(Withdrawn)*

2601-08-U: R.J. Potomski (Applicant) v. Sharon Pillon, Windsor Regional Hospital (Respondents) *(Dismissed)*

2692-08-U: The Corporation of the City of Hamilton (Applicant) v. International Union of Operating Engineers, Local 772 (Respondent) v. Hamilton Entertainment and Convention Facilities Inc. (Intervener) *(Dismissed)*

2903-08-U: Maria Szucs (Applicant) v. York University Staff Association (Respondent) v. York University (Intervener) *(Dismissed)*

2921-08-U: Labourers' International Union of North America, Local 183 (Applicant) v. Parkbridge Lifestyle Communities Inc. (Respondent) *(Terminated)*

2990-08-U: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Greg Hanna Construction Management Ltd. and Greg Hanna (Respondent) *(Terminated)*

3009-08-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Chartwell Seniors Housing REIT c.o.b. Glacier Ridge Retirement Residence (Respondent) *(Withdrawn)*

3285-08-U: Elementary Teachers' Federation of Ontario (Applicant) v. Toronto District School Board (Respondent) *(Withdrawn)*

3290-08-U: Communications, Energy and Paperworkers Union of Canada C.L.C. and its Local 333 (Applicant) v. The Corporation of the Town of Innisfil (Respondent) *(Withdrawn)*

3336-08-U: George Kokkinis (Applicant) v. United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Respondent) v. Nor-Sham (Markham) Hotels Inc. cob Delta Markham (Intervener) *(Dismissed)*

3365-08-U: Veronica Larmond (Applicant) v. Service Employees International Union Local 1.ON ("SEIU") (Respondent) *(Dismissed)*

3387-08-U: Mrs. Carmela Falasca (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. City of Toronto (Intervener) *(Terminated)*

3451-08-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Dynasty Furniture Manufacturing Ltd. (Respondent) *(Withdrawn)*

3561-08-U: Alex Elliott, Judy Husset, David Revoredo, Samaroo Valmiki and Surjinderjit Sohi On their own behalf and on behalf of the members of the bargaining unit at the Magna Seating Plant (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) (Respondent) *(Withdrawn)*

3584-08-U; 3585-08-U: Drivers of Brantco Construction, David Tavares, Manuel Moreira, Antero Inacio, Agostinho Andrade, Jose Pimental, Joe Resendes, Jim Mackanzie, Jason Scott, George Reis(Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Dismissed)* Drivers of Brantco Construction, David Tavares, Manuel Moreira, Antero Inacio, Agostinho Andrade, Jose Pimental, Joe Resendes, Jim Mackanzie, Jason Scott, George Reis (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) *(Granted)*

3724-08-U: Professional Institute Staff Association (Applicant) v. Professional Institute of the Public Service of Canada (Respondent) *(Withdrawn)*

3741-08-U: Randy T. Lance (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Carillion Canada Inc. (Intervener) *(Withdrawn)*

0039-09-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 765 (Applicant) v. 156652 Canada Inc. o/a Encore Steel (Respondent) Withdrawn

0049-09-U: Canadian National Federation of Independent Unions (Applicant) v. Prisoners with HIV/AIDS Support Action Network (Respondent) v. Canadian Union of Public Employees, Local 4308 (Intervener) *(Withdrawn)*

0056-09-U: Nadine Mullings (Applicant) v. OFHCW Liuna Local 1110 and (Respondent) *(Withdrawn)*

0134-09-U: Shawn Gregory Campbell (Applicant) v. Teamsters Local Union No. 419 Respondent) *(Withdrawn)*

0180-09-U: Canadian Union of Public Employees and its Local 3697.02 (Applicant) v. Toronto People with Aids Foundation (Respondent) *(Withdrawn)*

0181-09-U: International Union of Operating Engineers, Local 793 (Applicant) v. Terrastone Construction Inc. Respondent) *(Withdrawn)*

0190-09-U: Cathryn Lambert (Applicant) v. Teamsters Union 879 (Respondent) *(Dismissed)*

0193-09-U: Elementary Teachers' Federation of Ontario (Applicant) v. Simcoe County District School Board (Respondent) *(Withdrawn)*

0237-09-U: Sophia Stamos (Applicant) v. Agraturf Equipment Services Inc. (Respondent) *(Dismissed)*

0362-09-U: Communications, Energy and Paperworkers Union of Canada, Local 2003-52 (Applicant) v. Vopak Terminals of Canada Inc. (Respondent) *(Withdrawn)*

0450-09-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. B'iggs Fire Suppression Inc., Patrick Brownrigg, Shawn Brownrigg and Luke Brownrigg (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

0449-09-M: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 - Sprinkler Fitters of Ontario (Applicant) v. B'iggs Fire Suppression Inc., Patrick Brownrigg, Shawn Brownrigg and Luke Brownrigg (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0202-09-M: 1138826 Ontario Limited c.o.b. as Pino's Get Fresh (Applicant) v. Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Respondent) *(Terminated)*

TRUSTEESHIP

1022-08-T: Canadian Union of Public Employees (Applicant) v. Canadian Union of Public Employees, Local 4249 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

1851-08-JD: Millwright Regional Council of Ontario and its Local 1007 (Applicant) v. International Brotherhood of Electrical Workers, Local 105, Aecon Industrial (Respondents) *(Granted)*

2306-08-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 736 (Applicant) v. V.K. Mason Construction Company, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1499-05-OH; 1500-05-OH: Mukesh Goel (Applicant) v. Peel District School Board (Respondent) v. The Ontario Secondary School Teachers' Federation, District 19 (Intervener) *(Dismissed)*

1500-05-OH: Lynda Svergun (Applicant) v. Peel District School Board (Respondent) v. The Ontario Secondary School Teachers' Federation, District 19 (Intervener) *(Withdrawn)*

2221-07-OH: Robert McLaughlin (Applicant) v. Graphite Speciality Products Ltd. and/or Ferns Golf & Country Club (Respondent) *(Granted)*

1937-08-OH: Kimberly Stinson (Applicant) v. Supply Chain Management Inc. (Respondent) *(Terminated)*

3506-08-OH: Dennis Dwayne Pomeroy (Applicant) v. Abe's Auto Recycling Inc. (Respondent) *(Withdrawn)*

3588-08-OH: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Turtle Island Recycling Co. Inc., Louis Anagnostakos, Clint Sankar (Respondents) *(Terminated)*

3657-08-OH: Adrian Kinsman (Applicant) v. KTI Ltd. (Respondent) *(Withdrawn)*

3777-08-OH: Carla Reis (Applicant) v. Cintas Corporation (Respondent) *(Terminated)*

3787-08-OH: Robert Kennedy (Applicant) v. Waste Services (CA) Inc. (Respondent) *(Withdrawn)*

0223-09-OH: Marc Pothier (Applicant) v. Mitten Inc., Connie Barnard, Melissa Boylan, Greg Kains, Guy Valeriote (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

3699-06-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Gold Park Homes and/or Edenfield Developments and/or P. Cipriano Construction Ltd. (Respondent) *(Withdrawn)*

1965-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Capital Contracting & Interiors Inc. (Respondent) *(Dismissed)*

3652-07-G: Construction and Allied Workers, Local Union 607 (Applicant) v. Lockerbie & Hole Inc.(Respondent) *(Withdrawn)*

0875-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Furtive Networks Inc. c.o.b. as Demarcation Point (Respondent) *(Endorsed Settlement)*

1573-08-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Oak Meadows Estates Inc. and/or Beaverbrook Estates Inc. and/or Beaverbrook Homes Inc. and/or Index Construction Inc. (Respondent) *(Withdrawn)*

2134-08-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Black & McDonald Limited (Respondent) *(Withdrawn)*

3125-08-G: Millwright Regional Council of Ontario on its own behalf and on behalf of Millwright Local Union 1425 (Applicant) v. 1309872 Ontario Inc. o/a I.C. Mechanical and, Roland Hofmann (Director) and, Kevin Whalen (Director) (Respondents) *(Endorsed Settlement)*

3342-08-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Crossby-Dewar Inc. (G. Bott) (Respondent) *(Withdrawn)*

3346-08-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Crossby-Dewar Inc. (A. Clouthier) (Respondent) *(Withdrawn)*

3467-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Valleyview Contracting Limited (Respondent) *(Endorsed Settlement)*

3648-08-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Graystone Contracting Inc. (Respondent) *(Withdrawn)*

3697-08-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 2121645 Ontario Inc. c.o.b as Creative Creations and George Almbanis (Respondent) *(Endorsed Settlement)*

0041-09-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. National Millwork Inc. (Respondent) *(Withdrawn)*

0095-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. The City of Toronto (Respondent) *(Withdrawn)*

0107-09-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local397, Local 446 Local 494, Local 785, Local 1669, Local 1946, Local 2222, Local 2486 (hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Arcangelo's Construction Ltd. (Respondent) *(Granted)*

0164-09-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpentersand Joiners of America (Applicant) v. Millenium Drywall Inc. (Respondent) *(Granted)*

0173-09-G: Labourers' International Union of North America, Local 625 (Applicant) v. Vito Masonry (Respondent) *(Terminated)*

0182-09-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 6665268 Canada Inc. o/a Absolute Installations (Respondent) *(Endorsed Settlement)*

0194-09-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Menkes Developments Inc. (Respondent) *(Withdrawn)*

0215-09-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Entera Utility Contractors (Respondent) *(Withdrawn)*

0216-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Rage Design Inc. (Respondent) *(Granted)*

0218-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Wasif Yousif c.o.b. as Khider Electromechanical (Respondent) *(Endorsed Settlement)*

0229-09-G: The United Brotherhood of Carpenters and Joiners America, Local 93 (Applicant) v. R. Baun Construction Inc. and, B & B Millwork Inc. (Respondents) *(Granted)*

0247-09-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) V. Clegg Glass (2008) Inc. (Respondent) *(Endorsed Settlement)*

0253-09-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Skywall Systems Inc. and, The Sky Construction Inc. (Respondents) *(Granted)*

0295-09-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 3815684 Canada Inc. c.o.b. as Canada Interior System and Acoustic Ceiling (C.I.S.A.C.) (Unregistered Business Name) (Respondent) *(Granted)*

0312-09-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Honeywell Limited (Respondent) *(Withdrawn)*

0344-09-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Marina Park Resort Inc., and William Armstrong (Respondent) *(Granted)*

0355-09-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Trade-Mark Industrial Inc. (Respondent) *(Withdrawn)*

0403-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Applicant) v. Jay's Contracting (Respondent) *(Granted)*

0406-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Jakes Crane Service and Machinery Movers Inc. (Respondent) *(Withdrawn)*

0408-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. Lambton Metal Works Ltd. (Respondent) *(Withdrawn)*

0414-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. F & L Contracting (Respondent) *(Withdrawn)*

0415-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. St. Peter Steel Inc. (Respondent) *(Withdrawn)*

0416-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Withdrawn)*

0417-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Monac Steel Ltd. (Respondent) *(Withdrawn)*

0420-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Locals 721, 765 and 786 (Applicant) v. Bass Installation (Respondent) *(Granted)*

0421-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Locals 721, 765 (Applicant) v. Prasher Steel Ltd. (Respondent) *(Withdrawn)*

0423-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. R & B Construction Services Inc. (Respondent) *(Granted)*

0424-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 Applicant) v. AMF All Metal Fabricating Ltd. (Respondent) *(Granted)*

0425-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 and 786 (Applicant) v. Canadian Steel Innovations (Respondent) *(Withdrawn)*

0427-09-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Terra Discovery Ltd. (Respondent) *(Granted)*

0441-09-G: International Union of Operating Engineers, Local 793 (Applicant) v. Newlin Holdings Limited (Respondent) *(Granted)*

0452-09-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 and 786 (Applicant) v. Canadian Steel Innovations (Respondent) Granted)

0455-09-G: Canadian Union of Skilled Workers (Applicant) v. Hydro One Inc. (Respondent) *(Withdrawn)*

0458-09-G; 0459-09-G: Construction Workers Local 52 Affiliated with Christian Labour Association of Canada (Applicant) v. Decc Electrical Inc. (Respondent) *(Granted)*

0471-09-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Altec Sheet Metal Inc. (Respondent) *(Granted)*

0472-09-G: Labourers' International Union of North America, Local 493 (Applicant) v. 1211246 Ontario Inc. c.o.b. Richard Lake Building Centre (Respondent) *(Withdrawn)*

0473-09-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Habeda Engineering Limited (Respondent) *(Withdrawn)*

0494-09-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Altec Sheet Metal Inc. (Respondent) *(Granted)*

0526-09-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Raywin Industries Limited (Respondent) *(Granted)*

APPLICATIONS FOR ACCREDITATION

2176-08-R: Residential Tile Contractors' Association (Applicant) v. Universal Workers Union, Labourers' International Union of North America, L.I.U.N.A. Local 183 (Respondent) v. Terrazzo, Tile & Marble Guild of Ontario Inc., Brick and Allied Craft Union of Canada and, Brick and Allied Craft Union of Canada, Local 31 (Interveners) *(Granted)*

APPEALS - EMPLOYMENT STANDARDS ACT

2777-02-ES: 1408127 Ontario Inc. o/a Goodyear Certified Auto Service (Applicant) v. Jim Linardatos and, Ministry of Labour (Respondents) *(Granted)*

3620-04-ES: 1031329 Ontario Inc. o/a Rosina's Esso (Applicant) v. Davin Gale, Director of Employment Standards (Respondents) *(Withdrawn)*

3965-05-ES: 1287529 Ontario Limited o/a The Corral (Applicant) v. Paula Wooten and, Director of Employment Standards (Respondents) *(Withdrawn)*

0254-06-ES: Atta Enterprises Inc. (Applicant) v. Isabel Gomez and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0216-07-ES: Melissa Hoving (Applicant) v. Independent Living Residences for the Deaf & Blind in Ontario and, Director of Employment Standards (Respondents) *(Withdrawn)*

0414-07-ES: Beaumont Chorny, a Director of Howell Energraphics Inc. (Applicant) v. Wayne S. Clark et al, and, Stephen Niles, Director of Employment Standards (Respondents) *(Dismissed)*

0441-07-ES: Caroline Brodhagen (Applicant) v. 942042 Ontario Inc. o/a Healthworks with the Edge and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1316-07-ES; 1317-07-ES: Michael P. Megaffin, a Director of FB Bindery Services Inc. (Applicant) v. Xuan Thi Luc, Youmattie Lakraj, Erlinda B. Mohamed, Niroja Ravicharndran, Hetrawattie Singh, Director of Employment Standards (Respondents) Oscar D. Bolano, a Director of FB Bindery Services Inc. (Applicant) v. Xuan Thi Luc, Youmattie Lakraj, Erlinda B. Mohamed, Niroja Ravicharndran, Hetrawattie Singh, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1693-07-ES; 1781-07-ES: Julia Silva a Director of 1284316 Ontario Inc. o/a Sentra Contracting (Applicant) v. Mikhail Malyugin and, Director of Employment Standards (Respondents) Joseph MacKinnon a Director of 1284316 Ontario Inc. o/a Sentra Contracting (Applicant) v. Mikhail Malyugin and, Director of Employment Standards (Respondents) *(Dismissed)*

1999-07-ES: David Anthony Aello, Paola (Paul) Di Giammatteo, Roy Murad, Directors of Les Aliments Mia Food Distributing Inc. (Applicant) v. Laura Carlucci-Cappiello, Paul A. Douglas, Dario Esposito, Markus Fuellert, Thomas Fuellert, Gabriel D. Lado, Byron Loayza, Danny Loayza, Servio E. Loayza, Rosemary Naccarato, Frank Venditti, Roberto Woolmann, Kelly Ann Young, Nicola Damiano, Abdoulie Darbo, Lina Di Cerebo, Roberto Di Giammatteo, Ricardo Ford, Wayne Ford, Andrea Garner, Eduardo Gorotiza, Enzo Guglietti, John Iamonaco, Edosomwan Lawrence, David Leung, Charles Loayza, Ernesto Lupallier, Jo-Ann McNaughton, Roberta Nyame, Tony Ogbebor, Marco Panici, Andrea Pittis, Isidro Quintanilla, Gulla Spagnuolo, Mary Tsaboucos, Alexander Twum, Samuel Twum, Salvatore S.F. Fallelta, and, Director of Employment Standards (Respondents) *(Dismissed)*

2717-07-ES: RGIS Inventory Specialists of Canada, Inc. (Applicant) v. Treena St. Jean and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3058-07-ES: Beaumont Chorny, a Director of Metrodirect Publishing Corp. (Applicant) v. Joanne Geller and, Director of Employment Standards (Respondents) *(Dismissed)*

0187-08-ES: Jodie Wilson (Applicant) v. Casino Rama Services Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

0352-08-ES: Maricel Lupu (Applicant) v. Homa Technical Services Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0745-08-ES: Donna Rodrigues (Applicant) v. Bonnie Togs Children's Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1172-08-ES: Laurie Puhach-Gaudette (Applicant) v. Lina Dinah M. Cayaban and, Director of Employment Standards (Respondents) *(Dismissed)*

1197-08-ES: Hair 2 Inc. (Applicant) v. Mona Ishmael and, Director of Employment Standards (Respondents) *(Dismissed)*

1665-08-ES: Irene S. Faria, a Director of Profine Molds Inc. (Applicant) v. Jack Amaral, Fatima Au, Steven Belanger, George Belo, Ricardo Beron, Atila Biber, H. Boxwala, Paulo Campos, Denise Castelmezzano, R. Chahal, Matt Chamberlin, Thomas Cheung, Michael Conrad, Mario Contente, Jose Crispin, Van Thuan Do, George Eigler, Schon Faria, Syed H.A. Fathi, Ratna Gandhi, Vito Giglio, John Glac, Manindra Gohia, Bruno Gomes, Christina Gomes, Michael Gomes, Allan Hall, Lam Van Ho, John Iaquinta, Mike Jelinski, M. Kanesu, R. Kanhiroli, Julie Karagan, Ashley Kuchar, Peter Kuchar, Yat Kwong Lai, Huy Hnat Le, Luciano Leite, Michael Lester, Chun-Wah Luk, Daniel Lukula, Louise Luskey, Martin MacLeod, Khuswant Multani, Peter Neudorf, Minh Thanh Ngo, Khanh Van Nguyen,

Nikola Ozanic, P. Paramashi, Mauricio Paratore, M. Puthiyavee, Tihomir Rados, Michael Renaud, Carlos Santos, N. Semiuck, S. Shammana, D. Sookdeo, Allan Staples, Wayne Stoddard, Hong Kien Truong, Sean Vella, S. Vemannaga, Henryk Walczak, Josef Widlak, Minheng Xu, Victoria Yacobovich, Adam Zharzly and, Director of Employment Standards (Respondents) *(Withdrawn)*

1751-08-ES: Min Sheng, Ren (Applicant) v. Sahauli Transport Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

1824-08-ES: Guelph Nissan Limited (Applicant) v. Chris Bilyea and, Director of Employment Standards (Respondents) *(Dismissed)*

1983-08-ES: 981199 Ontario Inc. o/a Mississauga Orthopaedic & Sports Injury Centre (Applicant) v. Dalia Wassef and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2107-08-ES: 1512081 Ontario Ltd. o/a Abrams (Applicant) v. Brandon Colnar and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2335-08-ES: William Steven Zeleny o/a McKellar Marine Centre (Applicant) v. John Takacs and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2399-08-ES: Sarah Edwards (Applicant) v. Catholic Children's Aid Society of Hamilton and, Director of Employment Standards (Respondents) *(Withdrawn)*

2409-08-ES: Stephanie Vanderlee (Applicant) v. Blockbuster Canada Co., and, Director of Employment Standards (Respondents) *(Dismissed)*

2674-08-ES: Vineland Growers' Co-operative Limited (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

2722-08-ES: Sommaphan M. McGivern (Applicant) v. Alicesara Myles o/a A K Placement Agency and, Director of Employment Standards (Respondents) *(Dismissed)*

2812-08-ES: Liliana Osores (Applicant) v. J.E. Strong Limited o/a Servicemaster Contract Services Mississauga, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2819-08-ES: 1724354 Ontario Ltd. o/a Home Hardware (Applicant) v.Mei Shi Liang and, Director of Employment Standards (Respondents) *(Granted)*

2879-08-ES: You Can Dance Studios Inc. (Applicant) v. Tara Galloro, and, Director of Employment Standards (Respondents) *(Dismissed)*

2975-08-ES: Gary Daoust (Applicant) v. Dell Canada Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2993-08-ES: Anthony D. I. Mutch, a Director of 2008344 Ontario Inc. Habitat Dining Lounge (Applicant) v. Adam McKinlay and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3006-08-ES: Jon S. Whitby, a director of Cross Border Recruiters Inc. (Applicant) v. Kim Murphy and, Lyndon Sequeira and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3011-08-ES: Patel Jayesh Ambalal (Applicant) v. J.M. Die Ltd., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3046-08-ES: Qing An (Applicant) v. 6966471 Canada Ltd. o/a Canada China News, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3114-08-ES: Zongen Li (Applicant) v. Traxx Tires Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3219-08-ES: Linda L. Behan (Applicant) v. J.C. Energy Equipment Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3272-08-ES: 2060235 Ontario Ltd. o/a North Deluxe Windows & Doors (Applicant) v. Wendy Murray, and, Director of Employment Standards (Respondents) *(Withdrawn)*

3306-08-ES: El Cantico Inc. o/a Geness Buffet Restaurant (Applicant) v. Hui Bo Yu and, Director of Employment Standards (Respondents) *(Granted)*

3309-08-ES: Reliable Bookbinders Limited (Applicant) v. Kevin Chiasson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3314-08-ES: Jenna L. Wrigley (Applicant) v. Raymond A. Renaud and Romana Renaud carrying on business as Reindance Equestrian Centre, Director of Employment Standards (Respondents) *(Withdrawn)*

3356-08-ES: Stephanie Begin (Applicant) v. Hong Guo operating as Rose and Thorne 111 and, Director of Employment Standards (Respondents) *(Granted)*

3406-08-ES: Grand Niagara Golf Corp. (Applicant) v. Christina Morgan and, Director of Employment Standards (Respondents) *(Terminated)*

3420-08-ES: Anil Hemnath (Applicant) v. The Staffing Edge Inc./Breakaway Staffing Solutions Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3464-08-ES: Tremont Wood Specialties Inc. (Applicant) v. Lori Humphries, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3473-08-ES: Lee Manning (Applicant) v. Magna International Inc./Massiv Die Form and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3515-08-ES: Money Express POS Solutions Inc. (Applicant) v. Peter Belair, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3529-08-ES: Salcros Maintenance Contractors Ltd. (Applicant) v. Janice Ferrier and, Director of Employment Standards (Respondents) *(Terminated)*

3546-08-ES: Daynia Chan (Applicant) v. Culture Clothing Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3594-08-ES: Weiguang Wu (Applicant) v. Great Connections Employment Services Inc. and, Director of Employment Standards (Respondents) *(Granted)*

3596-08-ES: Jenna Cultraro (Applicant) v. CEC Entertainment Canada, Inc. o/a Chuck E Cheese, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3619-08-ES: Hai-Dih (Jack) Wang (Applicant) v. Great Connections Employment Services Inc. and, Director of Employment Standards (Respondents) *(Granted)*

3627-08-ES: Andria Davis (Applicant) v. MVP Holdings Ltd., Director of Employment Standards (Respondents) *(Dismissed)*

3629-08-ES: Coxwell Animal Clinic Professional Corporation (Applicant) v. Maureen Beaune and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3662-08-ES: Hong Guo operating as Rose and Thorne111 (Applicant) v. John Anderson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3686-08-ES: 1736646 Ontario Inc. o/a Shoeless Joe's Restaurant (Applicant) v. Mark Bradnam and, Director of Employment Standards (Respondents) *(Terminated)*

3700-08-ES: Joseph Bratulic (Applicant) v. 1677298 Ontario Inc. o/a Supreme Autobath and, Director of Employment Standards (Respondents) *(Dismissed)*

3726-08-ES: Athar Sufi (Applicant) v. Metro Paper Industries and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3746-08-ES: Yuxian Zhang (Applicant) v. Aero Tech Precision Machining Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

3792-08-ES: Binatech Software Inc. (Applicant) v. John Corbett and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0002-09-ES: Ms. Maria Concepcion Borja (Applicant) v. International Clothiers Inc., and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0037-09-ES: Kamleshkumar Gandhi (Applicant) v.1632666 Ontario Inc. o/a Shell Canada Products, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0038-09-ES: Dino Amodio (Applicant) v. Sanjin Stanojevic o/a L&M Investments, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0044-09-ES: Annie Konyalian a director of Better Beverages of North America Inc. (Applicant) v. Robert J. Bracken, Sandra Grant, Mark Porlier and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0060-09-ES: Andrew Mals (Applicant) v. Knights on Guard Security Surveillance Systems Corporation and, Director of Employment Standards (Respondents) *(Withdrawn)*

0110-09-ES: Beresford Box Company Inc. (Applicant) v. Victor Slade, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0137-09-ES: Kimberley Reckin (Applicant) v. Lake Shore Gold Corp., and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0153-09-ES: Bilingual Source (Applicant) v. Brigitte Taylor and, Director of Employment Standards (Respondents) *(Terminated)*

0192-09-ES: Newtek Automotive Distribution Inc. (Applicant) v. Rene Desombre, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0196-09-ES: Hanhae Shin (Applicant) v. Gil-Mook Kim o/a Ebenezer Interior, Director of Employment Standards (Respondents) *(Terminated)*

0255-09-ES: Fava Insurance Brokers Limited (Applicant) v. Kristina Saunders and, Director of Employment Standards (Respondents) *(Terminated)*

0259-09-ES: Prabha K. Malwatta (Applicant) v. Zellers Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

0290-09-ES: MacLellan Welding Ltd. (Applicant) v. William Erb and, Director of Employment Standards (Respondents) *(Terminated)*

0341-09-ES: St. Joseph Print Group Inc. (Applicant) v. Leasa Paquette and, Director of Employment Standards (Respondents) *(Dismissed)*

0348-09-ES: Claudio Pacheco (Applicant) v. Westhaven Homes Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

0461-09-ES: Elisabeth Mece (Applicant) v. CRM North America Inc., and, Director of Employment Standards (Respondents) *(Terminated)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1775-05-HS; 3122-05-HS: Kelly Services (Canada) Ltd. (Applicant) v. Dwain Spicer, Inspector (Respondent) Kelly Services (Canada) Ltd. (Applicant) v. Thomas MacKay, Inspector (Respondent) *(Withdrawn)*

1250-08-HS: Greater Essex County District School Board (Applicant) v. Ontario Secondary School Teachers' Federation (District 9), CUPE Local 27, Elementary Teachers Federation of Ontario, Canadian Union of Public Employees, Local 1348 and, Rick Taggart, Inspector (Respondents) *(Withdrawn)*

2794-08-HS: International Brotherhood of Eectrical Workers Local 530 (Applicant) v. OptiSolar Farms Canada Inc. and, Todd Mayhead, Inspector (Respondents) *(Withdrawn)*

2891-08-HS: City of Brampton (Applicant) v. James Albrecht, Inspector (Respondent) *(Terminated)*

3742-08-HS: Tamarack Lumber Inc. (Applicant) v. United Steelworkers of America, Local 16506-32, and, Glen Howard, Inspector (Respondents) *(Withdrawn)*

0174-09-HS; 0175-09-HS; 0176-09-HS; 0224-09-HS; 0225-09-HS; 0226-09-HS: Paper Fibres Inc. (Applicant) v. The Employees of Paper Fibres Inc., Teamsters Local 938 and, Thomas MacKay, Inspector (Respondents) *(Withdrawn)*

0273-09-HS: Civic Motors Ltd. (Applicant) v. Guy Nadeau, Inspector (Respondent) *(Terminated)*

0276-09-HS; 0307-09-HS: PCL Constructors Canada Inc. (Applicant) v. Labourers' International Union of North America, Local 247, Labourers' International Union of North America, Ontario Provincial District Council, Sheet Metal Workers International Association, Local Union 269, Ontario Sheet Metal Workers' & Roofers' Conference and, Kevin Kealey, Inspector (Respondents) *(Granted)* Labourers' International Union of North America, Local 247 (Applicant) v. PCL Constructors Canada Inc., and, Kevin Kealey, Inspector (Respondents) *(Granted)*

0395-09-HS: Metro Ontario Inc. (Applicant) v. Employees of Metro Ontario Inc. Store #778, CAW Local 414, and, Lauren Ballantyne, Inspector (Respondents) *(Dismissed)*

0464-09-HS: Bucovetsky's (Applicant) v. Denise Michaud, Denis Bernard, Inspector (Respondents) *(Withdrawn)*

PAY EQUITY ACT

1921-08-PE: Little Scholar (of Oakville) Preschool Inc. (Applicant) v. Group of Employees of Little Scholar (of Oakville) Preschool Inc. (Respondent) *(Endorsed Settlement)*

2691-08-PE: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Ministry of Government Services) (Respondent) *(Dismissed)*

2705-08-PE; 2716-08-PE: Hansler Smith Ltd. ("Smith") (Applicant) v. Linda Lawrence, Christine Whitehouse, Phebe Palmer (Respondents) *(Withdrawn)*

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

2315-08-M: International Union of Operating Engineers, Local 772 (Applicant) v. The City of Hamilton and, Hamilton Entertainment and Convention Facilities Inc. (Respondents) Granted)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0116-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Rainbow Concrete Industries Ltd. (Respondent) *(Dismissed)*

2221-07-OH: Robert McLaughlin (Applicant) v. Graphite Speciality Products Ltd. and/or Ferns Golf & Country Club (Respondent) *(Dismissed)*

3582-07-U: Lyle A. Sawtell (Applicant) v. United Steelworkers of America, Local 9597 (Respondent) v. Securitas Canada (Intervener) *(Dismissed)*

1746-08-R: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721 (Applicant) v. Flynn Canada Ltd. (Respondent) *(Dismissed)*

1896-08-ES: Dennis J. Leonard (Applicant) v. Gilbert C. Storey Machinery Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

2662-08-JD: Labourers' International Union of North America, Local 1059 (Applicant) v. Bruce Power LP, and, International Union of Operating Engineers, Local 793 (Respondents) v. Electrical Power Systems Construction Association (Intervener) *(Dismissed)*

3353-08-ES: Ping Lee (Applicant) v. Betty's Law Office and, Director of Employment Standards (Respondents) *(Dismissed)*

3635-08-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Cougar Electric Ltd. Respondent) *(Dismissed)*

0255-09-ES: Fava Insurance Brokers Limited (Applicant) v. Kristina Saunders and, Director of Employment Standards (Respondents) *(Dismissed)* 0259-09-ES: Prabha K. Malwatta (Applicant) v. Zellers Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

Ontario Labour Relations Board,
505 University Avenue,
Toronto, Ontario
M5G 2P1

ISSN 0383-4778